The Dissertation Committee for Stephen Matthew Joyce Certifies that this is the approved version of the following Dissertation:

Judicial Federalism: A Comparative Study of its Origin, Operation, and Significance

Committee:

Daniel M. Brinks, Co-Supervisor
Gary J. Jacobsohn, Co-Supervisor
Zachary Elkins
Sanford V. Levinson
H.W. Perry

Judicial Federalism
A Comparative Study of its Origin, Operation, and Significance

by

Stephen Matthew Joyce

Dissertation

Presented to the Faculty of the Graduate School of

The University of Texas at Austin

in Partial Fulfillment

of the Requirements

for the Degree of

Doctor of Philosophy

The University of Texas at Austin

May 2020

Dedication

אַף־ אַף־עֶזְרָתִֽיךְ אִמַּצְתִּיךְ אֶ֭לְכֶּיךְ כִּי־אֲנִי אַל־תִּשְׁתָּעַ עִמְּךְ־אָ֑נִי כִּי אַל־תִּירָא צְדָקִֽי׃ בִּימִ֖ין תְּמַכְתִּֽיךְ

For Leo, Augustine, and Rose

You enriched the journey infinitely more than you prolonged it.

Acknowledgements

In the process of writing this dissertation, I have accumulated many debts. Much of what I write here, regarding particular people, applies just as much to the others whom I mention. I will surely fail to mention everyone who deserves my gratitude. I apologize in advance to those whom I do not mention by name. I am no less grateful to you for playing the important role that you did. The omission of your name here no more represents the measure of my thankfulness for you than the absence of certain natural and inalienable rights, among those expressly enumerated in the Constitution, implies their inapplicability or nonexistence. *Expressio unius est exclusio alterius* does not apply here. It should go without saying, but I will say it anyway: no one but myself is responsible for any weaknesses, errors, or inadequacies found in this dissertation

Perhaps all doctoral students say the same thing, but I could not have had a better dissertation committee. The wisdom, patience, and encouragement of Dan Brinks, my supervisor, knew no bounds. I have never been one to believe in fate, let alone a fate that determines every detail of our lives. But as I look back on the years during which I worked toward this doctorate, I realize that three events in particular have nearly persuaded me of particular providence. Dan's return to Austin from South Bend was the first. I will forever marvel at Dan's longsuffering loving-kindness toward me. He made time for me, even as his schedule filled up with his duties as Director of Graduate Studies and then Department Chair. Gary Jacobsohn provided the indispensable opportunity to prove myself in a class that I audited with him; he taught me the importance, excitement, and joy in studying comparative constitutional law. Zach Elkins welcomed me to the

department's public law field with open arms and graciously shared his expertise in methodology. One of my greatest regrets from my time at UT Austin is that I never took a formal class with him. H.W. Perry, whenever I was lucky enough to have a moment of his time, treated me like a colleague from the very beginning; before I could, he clarified and disentangled my own nascent theories, whenever they had me tied in knots. Sandy Levinson encouraged me by applying, to my inchoate hypotheses, his special ability to instantly identify the most interesting things about the set of observations, ideas, and questions that you bring to him. Perhaps most helpfully, each member of my dissertation committee possesses an excellent sense of humor and copiously employed it in order to ease my awkwardness, worries, and doubts.

Many other members of the department provided indispensable help. Raúl Madríd offered me the chance to conduct research for him, in the hope that it would increase the chances of my acceptance to the PhD program; he also offered sage advice at several "critical junctures." Wendy Hunter was a constant encouragement and a wellspring of useful advice, especially with respect to pursuing career and parenthood simultaneously. Catherine Boone, though no longer with the department, exemplified the outspokenness I hope to have some day; she encouraged my research on the regional and subnational, an interest that we happen to share, through her scholarship on Africa. Kurt Weyland taught me the many ways that "less can be more." Tse-Min Lee gently, humorously, and insightfully introduced me to the statistical study of politics. J. Budziszewski showed me how to be a scholar and a friend. Henry Dietz encouraged me in countless ways; most importantly, he showed me by example how to teach a large class.

Thank you Annette H. Park. Your value, to both my graduate education and the department as a whole, are immeasurable.

The friendship and camaraderie, of fellow UT Austin graduate students, made the journey easier and more enjoyable. I mention in particular Luke Pérez, William Blake, Ryan Lloyd, Mine Tafolar, Gina Altamirano, Calla Hummel, Henry Pascoe, Connor Ewing, and Alex Hudson.

I received significant help from teachers before my time at UT Austin. At Oxford, Kurt von Mettenheim generously helped me in a moment of great difficulty, when I had very few options. David Lumsdaine, Timothy S. Shah, and Daniel Philpott provided guidance, opportunity, and inspiration.

Perhaps much to their chagrin, my teachers at Middlebury turned me on to the idea of working in higher education. Despite their overt emphasis on the risks involved in pursuing an academic career, their manifest joy in teaching and writing unintentionally, or perhaps *covertly*, drew me to this path. Murray Dry, my mentor in the study of constitutional law, political philosophy, and American politics, taught me that I did not know how to write; and then he taught me how to write. Jeff Cason, who mentored me in both the comparative and social scientific study of politics, stimulated my interest in the history, economics, and politics of Latin America. I hope that this dissertation bears the marks of their investment in me. I know that it represents my attempt to combine the disparate interests that they sparked in me. I also thank Darién Davis, Mark Williams, Roman Graf, and Paul Nelson for being great teachers to me and for cultivating my

budding interest, respectively, in the study of Brazil, inter-American relations, comparative literature, and political philosophy.

Other friends were pivotal in this process. David Ramsey has been the most steadfast friend possible from the very beginning, when we met at St. John's College. He was a constant source of encouragement. I also thank Brad Glaza from my time at St. John's. Moving back to Vermont has meant a deepened friendship with Douglas Beagley, without which this dissertation never would have been completed. Correspondence with Steve Bertolino kept me sane. To all of you I say: *Εὐχαριστῶ τῷ Θεῷ μου ἐπὶ πάσῃ τῇ μνείᾳ ὑμῶν*.

I could not have finished this project without two long stays at "Chateau Van Meter" where my Aunt Charlotte and Uncle Charlie were fantastic hosts. My brother Timothy and his wife Mafer showered me with hospitality during a long productive stay at their home. I could not have completed this project without the help of Mark, my friend and source of counsel. Reconnecting with him is the second event in my life that almost makes me believe in meticulous providence. Thank you Bob Butler for the chance to play hockey and for your encouragement, counsel, and friendship. My friend Louise knows just how indispensible she was, both to the entire process. My mother-in-law, Kathy, provided steadfast support, encouragement, and help with my kids. I seriously doubt that many people are as lucky as I have been to have such a wonderful mother-in-law.

Finally, I will never be able to adequately thank my wife, Rebecca, for her patience, love, and understanding. Finding her at Middlebury is the event that comes closest to

convincing me of special providence. Because of your help Rebecca, more than that of anyone else, it is finished.

Abstract

Judicial Federalism: A Comparative Study of its Origin, Operation, and Significance

Stephen Matthew Joyce, PhD

The University of Texas at Austin, 2020

Supervisor: Daniel M. Brinks

Abstract: This comparative study of judicial federalism analyzes the origin, operation, and significance of the judicial systems found among past and present federations. Federal countries vary in the arrangement of their judiciaries. In some federations (e.g., U.S., Brazil, Australia), the subnational political units, such as states, provinces, and cantons, have judicial systems that belong to the subnational governments. In other federations, (e.g., Spain, Canada, India), the subnational political units do not have judicial systems that belong to the subnational governments. The countries in the first set manifest "judicial federalism," while the countries in the second set manifest "judicial centralization." Federations always have legislatures and executives at both the national and regional levels, but they do not always have judicial systems at both levels. This study offers an explanation for this divergence in institutional arrangement. Federations form in one of two ways. "Coming together" federations occur when multiple independent political units join together. "Holding together" federations occur when a country chooses to allow for the creation of subnational legislatures, executives, or

judiciaries. Federations created by “coming together” emerge from the federating process with "judicial federalism," while federations created by “holding together” emerge from the federating process with “judicial centralization. Differences between the two processes’ preexisting institttions, such as political borders and separate judicial systems, explains In addition to quantitatively analyzing a medium-N sized dataset of over sixty current and historical federations, this study presents five in-depth case studies of Brazil (both 1834 and 1891), the Central American Federation (1823-1824), Germany (1866-1871), and India (1947-1950). Some evidence exists supporting the hypothesis that territorially concentrated diversity engenders more decentralized federations. Non-institutional sources of fragmentation within a federation include both the material (e.g., income inequality between political units, factor endowments, geography) and the immaterial (e.g., language, ethnicity, religion). The quantity and quality of the structural diversity present during the creation of these five federations predicts the outcome that both this study’s thesis and the record of history contradict. These five federal moments provide even stronger evidence by being “crucial,” “hard,” or “least probable” cases. The conclusion explains exceptions such as Cameroon, Canada, and Communist federations.

Table of Contents

List of Tables

List of Figures

We should also know over which matters several local tribunals are to have jurisdiction, and in which cases authority should be centralized.

—Aristotle[1]

I think that to the extent that we ask public law people to move beyond their current expertise, it would be best to do more public law itself. For most of us this would mean any public law other than constitutional law, any court other than the Supreme Court, any public lawmaker other than the judge, and any country other than the United States.

—Martin Shapiro[2]

[1] (Aristotle 1996, 116)1299b 13

[2] (Shapiro 1989, 102)

PART ONE

INTRODUCTION, METHODOLOGY, EVIDENCE

13 And it came to pass on the morrow, that Moses sat to judge the people; and the people stood about Moses from the morning unto the evening. 14 And when Moses' father-in-law saw all that he did to the people, he said: 'What is this thing that thou doest to the people? why sittest thou thyself alone, and all the people stand about thee from morning unto even?' 15 And Moses said unto his father-in-law: 'Because the people come unto me to inquire of G-d; 16 when they have a matter, it cometh unto me; and I judge between a man and his neighbour, and I make them know the statutes of G-d, and His laws.' 17 And Moses' father-in-law said unto him: 'The thing that thou doest is not good. 18 Thou wilt surely wear away, both thou, and this people that is with thee; for the thing is too heavy for thee; thou art not able to perform it thyself alone. 19 Hearken now unto my voice, I will give thee counsel, and G-d be with thee: be thou for the people before G-d, and bring thou the causes unto G-d. 20 And thou shalt teach them the statutes and the laws, and shalt show them the way wherein they must walk, and the work that they must do. 21 Moreover thou shalt provide out of all the people able men, such as fear G-d, men of truth, hating unjust gain; and place such over them, to be rulers of thousands, rulers of hundreds, rulers of fifties, and rulers of tens. 22 And let them judge the people at all seasons; and it shall be, that every great matter they shall bring unto thee, but every small matter they shall judge themselves; so shall they make it easier for thee and bear the burden with thee. 23 If thou shalt do this thing, and G-d command thee so, then thou shalt be able to endure, and all this people also shall go to their place in peace.' 24 So Moses hearkened to the voice of his father-in-law, and did all that he had said. 25 And Moses chose able men out of all Israel, and made them heads over the people, rulers of thousands, rulers of hundreds, rulers of fifties, and rulers of tens. 26 And they judged the people at all seasons: the hard causes they brought unto Moses, but every small matter they judged themselves.

—Exodus 18:13-26, JPS

Federalism, lastly, means legalism—the predominance of the judiciary in the constitution—the prevalence of a spirit of legality among the people.

—A.V. Dicey[3]

I do not think the United States would come to an end if we lost our power to declare an Act of Congress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several States.

—Oliver Wendell Holmes, Jr.[4]

---

[3] (Dicey 1915)[3] (Holmes 1913)

Chapter 1

Introduction

Judicial Federalism's Origin, Operation, and Significance

EXPLAINING VARIATION IN JUDICIAL STRUCTURE AMONG FEDERATIONS

Federations differ in the organization of their court systems in many ways, but one type of institutional variation surpasses all of the others in both its importance and visibility; only some federations have subnational judicial systems in addition to and separate from their national ones (see Table 1.1). This dissertation offers an explanation for this divergence among federations, between federations with and federations without subnational judicial systems. This variation, among federations, stems from the differences between the "coming together" and "holding together" processes that create federations. Federal political systems that formed by integrating multiple states into one country contain plural court systems (e.g., the United States, Germany, Argentina). Federations that exist by virtue of devolution possess unitary judiciaries (e.g., Spain, India, and South Africa).

During the gestation of a federation, preexisting institutions affect the balance of power between the proponents of centralized federalism and the advocates of decentralized federalism. The outcome of the contest between those factions determines whether the federation's constituent moment will establish unitarism or federalism for that country's judicial branch of government. Federal countries vary in their "vertical" distribution of power. Along a continuum from being nearly unitary at one end to being nearly confederal at the other, federations entrust either an increasing number of prerogatives to the national government "above" or to the subnational governments "below." The balance of power does not affect the distribution of legislative, executive, and judicial power equally. Among federations, past and present, the "vertical" distributions of legislative and executive power exhibit greater diversity than the "vertical" distribution of judicial power.

Subnational judicial systems do not "belong" to the national judiciary in part because subnational governments—rather than the national government—choose, remove, promote, pay, and provide staff to the judges on those subnational courts. In the language that social scientists use to explain the behavior of judges, the subnational governments control the *attitudinal* and *strategic* influences on the decisions that their judges make. A government can also influence the behavior of its judges through the law that it gives those judges to interpret; the source of that law matters. In some federations, subnational judiciaries spend their time interpreting uniform national law; by controlling the words that subnational judges interpret, a national government can influence the substance of the decisions that subnational judges make. In other federations, subnational judiciaries spend their time interpreting the subnational law that their specific subnational government enacted. Subnational governments, like their national counterpart, write those laws in an attempt to circumscribe the range of interpretations that their judges make.

Variations among Federations and their Institutions

The study of federations has developed from initially identifying the causes of unification, centralization, and decentralization in political systems to more recently explaining variety in the institutions of federations (Beramendi 2012; Sambanis and Milanovic 2011; Wibbels 2005). But that research has not yet adequately explained the varieties of judicial institutions found in federations. This dissertation provides evidence to support the hypothesis that the nature of a federation's founding determines whether its states, provinces, or cantons have their own judiciaries.

Table 1.1 - Judicial Systems in Some Federations	
Decentralized Judicial Systems	**Centralized Judicial Systems**
Argentina (1860), Australia (1901), Bosnia Herzegovina (1997), Brazil (1891), Cameroon Federation (1961), Central African Federation/Federation of Rhodesia and Nyasaland (1954), China (1954), Colombia (1811), Czechoslovakia (1968), Ethiopia (1994), Ethiopia-Eritrea (1952), Germany (1871), Mexico (1824), Micronesia (1979), Switzerland (1848), UAE (1971), United States of America (1787), USSR (1923), Venezuela (1811), West Indies Federation (1958), Yugoslavia (1943)	Austria (1920), Belgium (1830), Bolivia (2009), Brazil (1834), Canada (1867), Central African Republic (1994), Colombia (1853), Comoros (1978), Democratic Republic of the Congo (1960), Democratic Republic of the Congo (2006), Kenya (1862), Pakistan (1956), Russian Federation (1993), South Africa (1994), Spain (1970)

Preexisting Institutions and the Balance of Power in a Constituent Assembly

Two particular institutions, political boundaries and preexisting judicial arrangements, link the nature of a federation's founding to the structure that the founders choose for that federation's judiciary. The presence of those institutions induces federal moments of integration to engender plural judiciaries and federal moments of devolution to produce unitary judiciaries. When it reorganizes itself as a federation, a unitary state adopts judicial centralization; when countries merge to form a federation, they choose judicial decentralization. A unitary state both enters and exits the federating process with just one court system. When N political units combine into one federation, the new country has at least N+1 judicial systems, because it maintains each of the subnational ones and acquires one national one.

A country participating in a federal integrative process carries with it not only its particular judicial system; it also brings the attendant vested interests of its judges, judicial staff, and local business leaders. Those groups prefer to keep their particular state

judiciary separate from the judiciaries that belong to the other political units participating in the process of federating. When the federating process has ended, those various political units will have agreed to the creation of at least one national court without which the federation cannot exist. But the political units will have also retained their separate judiciaries.

In both integration and devolution, political boundaries coincide with the boundaries of judicial institutions. As strange as it may sound to think of it this way, a unitary country's lone political boundary faces outward toward other countries; it matches the jurisdictional borders of its singular judicial system. When it transfers legislative and executive powers to newly created subnational governments, a national government also creates the new borders between them. But those new borders do not compel the national government to also delegate control over the judiciary to those new subnational governments. Even though preexisting structural cleavages (e.g., differences in language, topography, or natural resources) now coincide with those new borders, their centrifugal influence does not translate into the adoption of judicial federalism. This outcome serves as another step toward ruling out alternative explanations for the absence of judicial federalism.

Preexisting institutions also play a role in the process that creates a federation from separate political units. Political borders separate the judiciaries of the integrating political units. At the consummation of an integrative federation, the borders between political units transform into the demarcations between states within that federation. Similar characteristics among the federating political units do not lead to the extinction of the separate judiciaries of those political units. The federation does not combine those separate judicial systems into one national judicial system. The absence of structural

cleavages (e.g., ethnicity, wealth, or religion), stretched across the borders between those integrating political units, does not precipitate judicial unitarism. In a unitary country those structural elements would reinforce each other, because they coextend over the entire territory. They might even generate institutional unity. But, when states "come together" to form a federation, those coinciding cleavages do not overcome the effect of preexisting institutions.

Cleavages that crosscut a unitary country do not generate judicial federalism during devolution. The legislature that determines the political boundaries between the new provinces may even choose to make those political cleavages coincide with those structural cleavages, but the new federation will not include a system of subnational judiciaries. Even if multiple demographic, economic, and ideological cleavages coincide both with each other and with the nascent borders between the states, they do not overpower the inertia attributable to the preexisting centralized judicial system.

Debates in the Constituent Assembly

During those portions of the constituent assembly debates that touch on judicial institutions, both the existence of these institutions and the difficulty of rearranging them provide one side with leverage to exploit. In most cases of devolution, an ordinary legislature temporarily functions as a constitutional convention (e.g., India, 1946-1950), but in rare cases a country elects a special assembly separate from its ordinary legislature (e.g., Bolivia 2006-2007). Confederal legislatures oftentimes precede and coexist with the constitutional conventions that integrate separate political units into a federation (Argentina, 1860; U.S., 1787; Switzerland, 1848). In many of those "coming together" moments, the separate units have never before formed a working legislature together

(Australia 1891). The centralizers and decentralizers in the negotiations may trade various legislative and executive prerogatives. Centralizers might care more, for example, about having a certain legislative power at the national level than they do some potential feature of the national executive. But those exchanges rarely alter the *status quo ante* with respect to the presence or absence of a subnational judicial system.

Proponents of a unitary judicial hierarchy succeed in devolutionary processes of federal formation. Entrenchment, of both the centralized judiciary's institutions and those with vested interests in its preservation, provide enough inertia to prevent change. Advocates for a dual judiciary, on the other hand, win the debate when the federating process involves integration. When political units come together to form a federal political system, they only need to create one new court, a national supreme court; subnational court systems already exist to handle the rest of the country's judicial needs. Hence, in both types of federating, the judiciary's *status quo ante* perseveres.

AN OUTLINE OF THIS INTRODUCTION

The balance of this introduction addresses other preliminary issues. Part I briefly explores why the presence or absence of judicial federalism constitutes the most important variation in the judicial institutions of federations. It spells out why judicial federalism accounts for the variation among federations in the impact of their respective lower court systems. Part II underscores the practical implications of judicial federalism by highlighting a few of the ways it produces consequences for politics and public policy. Part III describes how state supreme courts in the U.S. have influenced three important areas of public policy: congressional re-districting, same-sex marriage, and K-12 public school funding. Part IV demonstrates that judicial federalism influences political life in

other legal systems that operate within the common law tradition. After exploring that Anglo-American judicial tradition, the Part V establishes that judicial federalism has consequences for judiciaries in the civil law tradition. Part VI puts judicial federalism in the context of other judicial institutions that tighten or loosen the national judiciary's control over a federation's legal system.

Comparative Studies of Judicial Systems in Federations –Abundance of Research on High Courts; Less Research on State, Provincial, Cantonal, and Länder Courts

Literature on the judiciary and federalism focuses upon the role of constitutional and other national apex courts rather than on state courts or judicial structure (Bednar 2013). Such research focuses almost exclusively on the jurisprudence of national apex courts (Tushnet 1990) that police and/or modify the boundary between federal and state prerogatives (Wheare 1963), when national executives and legislatures push them to do so. This is true whether we consider individual country studies (Kommers and Miller 2012) or comparative casebooks (Dorsen et al. 2010). In the typical script the highest constitutional court circumscribes the powers of the non-federal governments in the name of rights protected by the national constitution (Bermann 2001; Katz and Tarr 1996; Nicolaidis and Howse 2001).

The debate over the incorporation of the Bill of Rights against state governments in the United States via the Fourteenth Amendment is perhaps the most familiar manifestation of this phenomenon. While the study of the relationship between national courts and federalism deserves the attention it has received, subnational courts merit study because they can also have a profound affect on political life.

IMPORTANCE OF SUBNATIONAL COURTS FOR LAW AND POLITICS

An unprecedented global expansion in the strength of national[5] courts and their exercise of judicial power began during the Third Wave of Democratization at the end of the Cold War (Huntington 1991; Tate and Vallinder 1995); an analogous and at least equally important judicial revolution has occurred among inferior[6] courts in federations. In many of the same ways observed among national courts, the enlarged power and increased activity of lower courts have upended political life and public policy in their countries. Inferior courts have declared laws repugnant to constitutions, expanded the enforcement and number of rights protected by constitutions, and ordered agencies to provide for the social and economic rights enshrined in constitutions.

Cross-national Variation in the Empowerment of Lower Courts in Federations

But this growth in the impact of inferior courts has proceeded unevenly among federations, just as not all national courts have taken a larger role in their respective countries. The lower court systems of federations exhibit a diversity of behavior; we can place them along a continuum that extends from energetic courts to passive ones. The divergence in judicial behavior between different inferior court systems deserves an explanation. It merits comparisons between competing theories of its causation. The potential factors range from the structural (e.g., economics or demographics) to the ideational (e.g., legal tradition or political philosophy) to the institutional (e.g., voting

[5] "Central," "national," and "federal" refer to the one government responsible for at least one area of public policy for the entire country.

[6] Terms such as "state," "region," "canton," "province," and "Länder" refer to subnational political units that serve meaningfully analogous functions in their respective federations. General references to this type of political unit will interchangeably use "peripheral," "state," "subnational," "provincial," and "regional." Discussion of a specific country's subnational units will use the appropriate country-specific term.

procedures in the constitutional convention). The most logical explanation attributes the inconsistent behavior of inferior judiciaries to the diversity we observe in the organization of the institutions that most directly affect them.

The arrangement of judicial federalism in a country determines the amount of influence that state, cantonal, and provincial courts can have. When the central government controls all of the courts, it can use them to monitor peripheral governments, bring uniformity to the interpretation of federal law, and more effectively avoid the political consequences of making unpopular decisions legislatively. These tasks become more difficult without judicial centralization. With the presence of judicial federalism, peripheral courts can maintain jurisprudential diversity, shield their elected officials from electoral backlash, and weaken the central government's interference in the affairs of their semi-sovereign territories.

Peripheral courts can play an important role in public policy, but they cannot have influence if they do not exist. Put simply, in federations there are two types lower courts, even though they are both inferior to apex national courts. The courts of the central government include federal district and circuit courts. Truly subnational judicial systems comprise the courts that belong to states, provinces, and cantons. Subnational judicial systems may have their own judicial hierarchies of district and circuit courts, but they also have supreme courts with jurisdiction over the entire subnational political unit.

The increase in the dynamism of national courts has not snuffed out the surge of power and activity among state courts. The distinct role and prerogatives of provincial judiciaries partially explain not only their continued but also their increased importance. In every federal political system with genuine judicial federalism, the courts of the states, provinces, cantons, and Länder—rather than the courts of the central government—issue

most of that country's total number of judicial decisions. But, the courts of states, provinces, and cantons matter not only because they issue legal decisions that bind the parties to accept those rulings. In both federal and unitary political systems, the central government's courts have that power.

Most residents within one of those peripheral government's geographic boundaries will only have first-hand contact with any judicial system when they experience that peripheral government's judiciary. National[7] courts at the district, appellate, and supreme levels often lack the ability to review appeals from state judicial systems. Especially outside the realm constitutional law, the judicial systems in many federations either do not require, or require but cannot force, subnational courts to follow federal court decisions. In their interpretations of ordinary and constitutional law, subnational courts in some federations are expected to follow the legal precedents set by federal courts; but the judges of those subnational courts retain enough discretion to give expression to their particular legal philosophies. National courts, moreover, can only bring lower court decisions into conformity with national court jurisprudence for the portion of lower court decisions that litigants appeal from state court into federal court.

Scholars have highlighted how high courts and local courts can help weaken or strengthen subnational authoritarianism (McMahon 2003)According to Edward L. Gibson (Gibson 2012), courts can be one way that local authoritarianism comes to the attention of national elites; the involvement of the national government could then lead to the democratization of that authoritarian state, province, or canton.

[7] The terms "national," "central," and "federal" will be used interchangeably, even when the country is not called a "federation" or the court in question has jurisdiction over just one judicial district or circuit.

The Importance of Judicial Federalism in the United States

State supreme courts in the United States have altered areas of major public policy in the nineteenth, twentieth, and twenty-first centuries (Levinson 2012; Williams 2009). Changes in state supreme court majorities have important consequences because state supreme courts wield power (Fino 1987; Langer 2002; Shomade 2018; Sutton 2018; G. A. Tarr 1977). The actions of state supreme courts bear out these conclusions. Scholars have highlighted judicial federalism's real world implications for civil rights (Katz and Tarr 1996; G. A. Tarr and Porter 1982), judicial activism (Fino 1987; Glick 1971), vertical stare decisis (G. A. Tarr and Porter 1988), judicial independence (A. G. Tarr 2012), positive rights (Zackin 2013), and the quality of state high court judges (Choi, Gulati, and Posner 2008). Among other things, these state apex courts have transformed public policy with respect to electoral districts, K-12 public school funding, and same-sex marriage.

The Impact of State High Courts in the United States: Three Vignettes

Electoral Districts

While the U.S. Supreme Court has taken an increasingly hands-off approach to political and other gerrymandering, state courts have taken an increasingly hands-on approach. During the 1960s, the Supreme Court issued a series of decisions that progressively circumscribed the power of the states to draw electoral districts however they wanted (e.g., *Baker v. Carr*, *Wesberry v. Sanders*, and *Reynolds v. Sims*), culminating with the doctrine of "one man, one vote." Without reversing those earlier decisions, the Court has more recently declined to involve itself in disputes about redistricting. This string of cases culminated with the Court's determination in 2019 that

judging partisan gerrymandering cases is outside of the remit of the federal court system due to the political questions involved (*Rucho v. Common Cause* and *Lamone v. Benisek*).

Pennsylvania

In 2012 after rejecting preliminary legislative districts by a vote of 4-3, the Pennsylvania Supreme Court unanimously approved the legislature's revised maps (S.C. of PA 2013). The state used those maps for state and federal legislative elections in both 2014 and 2016. Nearly six years later, a 4-3 majority ruled that the districts violated the state's constitution because the legislature had gerrymandered them (S.C. of PA 2018) The governor had appointed three new justices, and one of the justices who approved the districts in 2012 voted to reject them in 2018.

The Court instructed the state to propose new maps within 25 days. Pennsylvania did not propose new maps but unsuccessfully appealed to the United States Supreme Court for a stay. When the deadline passed and the Pennsylvania government still had not submitted new district maps, Pennsylvania's Supreme Court drew its own maps for use in the 2018 elections. Hoping to override those maps, Pennsylvania appealed to the U.S. Supreme Court, again unsuccessfully. The government of Pennsylvania also unsuccessfully challenged the Pennsylvania Supreme Court's decision in federal district court. Hence at both the top and bottom of the federal judicial hierarchy, the state's efforts in federal court failed. Both federal and state elections took place in 2018 using the Court's maps.

Pennsylvania lost its case in the U.S. Supreme Court because the state supreme court based its decision only on the state constitution. Had the Pennsylvania Supreme

Court predicated its decision only on the U.S. Constitution, the U.S. Supreme Court most likely would have intervened:

> The reason is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and Federal judicial systems and in the limitations of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of Federal laws, our review could amount to nothing more than an advisory opinion. (Jackson 1945)

Pennsylvania could only be the defendant in any legal challenge to the original maps because Pennsylvania had approved the maps. The plaintiffs had the exclusive right to choose between the federal and state judiciaries as the venue for initiating the process. If a federal court, rather than a state court, had invalidated the maps the case would have fallen within the U.S. Supreme Court's reach. By choosing a state court as the venue and convincing the judges to base their decision on only the Pennsylvania constitution, the plaintiffs had managed to keep the U.S. Supreme Court out of the process, even though it affected federal congressional districts. Pennsylvania was not the first to see a successful challenge to gerrymandering and it is not likely to be the last (Schultz 2005).

Same-Sex Marriage

Notwithstanding contrary public opinion in the state, in 2009 the Iowa Supreme Court unanimously held that Iowa's Constitution included a right to marriage for same-sex couples. According to the Des Moines Register, a majority of Iowans opposed same-sex marriage in 2003 (65%) and 2008 (62%) (Zamora 2018). Only months later 62% of Iowans disapproved of any legislative attempts to reverse the decision (Zamora 2018),

but in 2010 Iowans voted to unseat all three of the justices on the ballot. No Iowa Supreme Court justice had ever lost a retention election.

Ultimately the Iowan electorate maintained a majority of the seven justices who had signed the opinion that forced the state to recognize same-sex marriage. By 2011 only a 37% plurality still rejected the Court's decision (Zamora 2018), and a fourth justice retained his seat in 2012. The remaining three justices from the 2009 decision kept their seats in 2014's retention elections. Iowan popular opinion flipped from opposing same-sex marriage to supporting it. This state court sequence, of backlash followed by adjustment, mirrors Ura's model for the U.S. Supreme Court (Ura 2014) Chen, Levonyan, and Yeh find parallel results for public responses to federal district court decisions (Chen and Levonyan 2019). The state legislature never even proposed a constitutional amendment to reverse the Court's decision. But Iowa was only the most unexpected case of state supreme courts at the forefront of the right to marriage for same-sex couples.

Among the earliest states whose supreme courts ordered them to confer marriage rights on same-sex couples, Iowa's experience was unique. State courts in Vermont (1999), Massachusetts (2003), New Jersey (2005), and California (2008) extended to same-sex couples the same rights guaranteed to opposite-sex marriages, whether they used the term marriage or civil union.

While those five states leaned to the left of the political spectrum, Iowa had begun leaning slightly to the center-right. Iowa went to the Republican candidate in 2000 and 2004 but the Democratic candidate in 2008 and 2012. All five of the other states voted for the Democratic presidential candidate in 2000, 2004, 2008, and 2012. In those states, Republicans held only one Senate seat for three years. Iowa had one Senator from each

party. The Iowa congressional delegation split terms, thirteen Republicans to twelve Democrats. Democrats held congressional delegation majorities in VT (6/6), MA (60/60), CT (41/50), NJ (43/78), and CA (200/317).

Yet even the experience of some Democratic Party strongholds, such as Massachusetts, Vermont, and California, support the inference that state courts played a central role in establishing same-sex marriage as a right nationwide. In line with a now familiar theory of judicial behavior (Graber 1993; Lovell 2003; Whittington 2005; 2009), the courts in these three states provided cover for the legislative branch. Many legislators favored same-sex marriage but found it politically inadvisable to follow their consciences and vote openly in its favor. Until the Court's decision in 2003, Massachusetts saw no legislative proposals to establish same-sex marriage but did see some to proscribe it. In its decision, the Court ruled out the possibility of civil-unions as a compromise between the proponents and opponents of same-sex marriage.

In three state constitutional conventions, the proponents of same-sex marriage managed to fend off an amendment that would have made it unconstitutional for the legislature to treat same-sex marriage as equal to opposite-sex marriage. When it became clear that enough delegates (roughly 101 of the 200 members) to the 2002 Massachusetts constitutional convention would vote to put an amendment against same-sex marriage to a statewide referendum, the convention's leadership circumvented it by holding a procedural vote (137 to 53) to close the convention entirely (Abraham 2002). In other words, before the Court's 2003 decision, a large portion of Massachusetts's legislators (perhaps even a quarter of them) preferred to avoid a vote on the issue, whether that would have meant voting for or against same-sex marriage. Civil unions did not even come up for discussion. But in the convention of 2004

Popular opinion on gay marriage reacted to the Court's decision. Polls by the same company, KRC Communications, found that, whereas 50% of the population of Massachusetts supported gay marriage immediately before the Court's decision, only 35% supported it three months later (Phillips 2004) Not long thereafter the people of Massachusetts overwhelmingly supported same-sex marriage.

These shifts took place well before both *United States v. Windsor* (2013) and *Obergefell v. Hodges* (2015), suggesting that law (a court decision) genuinely nudged culture (public opinion) in a specific direction. In Vermont, one of the most Democratic states in the country, both the state supreme court and the government faced a backlash. In response to the state supreme court's decision, Vermont Republicans gained not only the governorship but also a majority in both houses of the state legislature, doing so for the first time since 1992. In a referendum a majority of voters in California reversed the decision of the state's supreme court.

Since the beginning of the movement, state supreme courts have played a central role in the advancement of same-sex marriage rights. Until Connecticut (2005), no state had legislated civil unions or same-sex marriage unless its state supreme court had ordered it. Unlike civil unions in Vermont and Connecticut, domestic partnership laws in Washington (2007), New Hampshire (2007), and Oregon (2008) did not confer the full panoply of marriage rights. Maine's government adopted a bona fide same-sex marriage law in 2009, but a popular referendum repealed the law that year.

State supreme courts continued to dominate the process even after some states adopted same-sex marriage legislatively. After New Hampshire enacted same-sex marriage in 2009, only two of the six states with same-sex marriage had adopted it without a judicial order. New York became the third in 2011. Only in 2012 did the states

that adopted same-sex marriage without a judicial order have a majority, six states to four. Even as late as 2013 when four more states adopted same-sex marriage legislatively, New Mexico adopted same-sex marriage under the order of its supreme court. Federal courts brought most of the rest of the states into the fold before the Supreme Court issued *Obergefell*, but state courts had both initiated the process and kept it going.

K-12 School Funding

When the effort to end the reliance on property taxes to fund school districts failed at the U.S. Supreme Curt in *San Antonio v. Rodriguez* (1973), it did not foreclose achieving the same goal through state courts (Paris 2010). California's Supreme Court had already ruled in *Serrano v. Priest* that both the California and Federal Constitutions invalidated that state's public school funding system. Because the California Supreme Court had based its decision not only on the national constitution but also on the state constitution, *San Antonio v. Rodriguez* did not undo the effect of *Serrano v. Priest* (Pollock 1982).

Plaintiffs in other states followed suit, basing their school funding challenges on their respective state constitutions (Rebell 2009). But outcomes have not been uniform from one state to another. Even in the face of meaningfully similar constitutional language (Beavers and Emmert 2000), some supreme courts have decided for plaintiffs while others have ruled for state governments (Swenson 1999). The Supreme Court of Alabama, for instance, overturned a school funding settlement that a state lower court had approved. And dissimilar constitutional language has not prevented similar outcomes.

Plaintiff victories in court have varied in scope, for example, from rulings that found inadequate funding and those that identified unequal funding (Lukemeyer 2003). State supreme courts disagreed with each other as to whether equity (justice) required equality of funding. The New Jersey Supreme Court held in *Abbott v. Burke* (1985) that unequal funding for poorer districts violated the New Jersey Constitution. In *Gannon v. Kansas* (2010) the Kansas Supreme Court decided that the state was inadequately and inequitably funding public schools.

Even the very definition of "adequate" has varied. In some states it has meant a floor level of funding for all of a state's school systems. For other state supreme courts, "adequate" has signified unequal funding between state school systems. Mere equality would not sufficiently counteract the disadvantages among children living in poorer communities, such as single-parenthood, housing insecurity, and inadequate public safety.

The outcomes from litigation have varied from state to state and sometimes from year to year in the same state. Admittedly, the elected officials of states such as Ohio have chosen to ignore the school funding decisions of their supreme court and replace its justices. In other states the members of state governments have benefited from state supreme court decisions that shield them from constituent complaints about higher property taxes, the redistribution of funding from wealthier to poorer school districts, and the loss of local control over public education. They wanted more equality and equity in the their state's K-12 funding, but the number of like-minded legislators had not reached critical mass. Increased financial resources among the public schools of less advantaged districts have improved at least some student outcomes.

Studying Comparative Federalism without Studying the Judiciaries of Federations

Much of the most groundbreaking work in the field of comparative federalism makes no mention of even the national judiciary (Burgess 2006; 2012; Elazar 1987; Filippov, Ordeshook, and Shvetsova 2004; Hueglin and Fenna 2006; Kincaid 2011; Ostrom 2008; Swenden, Loughlin, and Kincaid 2013; L. Ward and Ward 2009; Watts 2008). The "Global Dialogues on Federalism" series, published by the Forum of Federations, inadvertently deemphasizes the importance of the judicial power more generally and of the subnational judiciaries of states, cantons, and provinces, more specifically, by the way that they focus on the legislative and executive branches(Burgess and Tarr 2012; Kincaid and Tarr 2005; Majeed, Watts, and Brown 2006; Michelmann 2009; Moreno and Colino 2010; Steytler 2009). Even the volume in the series, that focuses specifically on each of the individual branches of government, spends far more time on the legislature and executive than it does on the judiciary (Le Roy and Saunders 2006). This dissertation moves beyond both those studies that focus only on judicial federalism in the United States and those studies that compare federations without considering their judicial systems.

From American Judicial Federalism to Comparative Judicial Federalism

Examples from the United States underscore the importance of a federal polity's division of judicial institutions between the central and peripheral governments, but the impact of subnational courts extends well beyond the borders of America. The structure of Australia's judiciary does not perfectly match that of the United States, but both countries have state courts. Smyth, Mishra, and Fausten have found that legal precedents do not spread among Australian state courts symmetrically (Fausten and Smyth 2008; Smyth and Mishra 2011). Certain state courts have more influence than others over their

fellow state courts. Australia has a putatively unified system of common law, but the High Court of Australia cannot as effectively enforce uniformity in the system when Australian state courts drive much of the variation and the High Court only hears fewer than one hundred cases a year.

Forgotten Importance of the Judicial Interpretation of Ordinary Law

National supreme courts have understandably received the majority of attention during the worldwide expansion of judicial power, but judicial interpretations of ordinary law also change public policy. For instance, roughly a third of the U.S. Supreme Court's cases have involved statutes rather than the federal or a state constitution. Constitutional judicial review does not constitute all of judicial review *per se*. Judicial review consists in the capacity of a court to consider and determine if an ordinary law, international treaty, agency regulation, or executive behavior conflicts with current statutes or a constitution.

Legal cases do not have to raise constitutional issues in order to affect a political system. Judiciaries interpret whether the behavior of the executive branch conforms to the nature of the discretion that a legislature has delegated to it. Courts also determine whether the executive properly executed a law such as the simple application of criminal law to a particular defendant. Judges decide between conflicting laws when neither of them clearly supersedes the other, for instance because the case raises issues of jurisdictional ambiguity. A legislature may inadvertently create a conflict by expressly overriding the principle *lex posterior derogat legi priori*: newer laws vitiate any older ones that contradict it. The judicial system also reviews the behavior of administrative agencies that have semi-independent status with respect to the political branches.

Non-constitutional interpretation can become especially important in federations, and even more so in those without vertical *stare decisis* for ordinary laws. In some federations (e.g., Germany, Brazil, Argentina) legislative jurisdictions do not match judicial jurisdictions. State courts often constitute the primary, secondary, and even tertiary tiers of the judicial process, even though the national government wrote the laws that they are interpreting (Pernice 1996). Can such legislative uniformity sufficiently counteract that judicial diversity? In other systems without subnational courts (e.g., Spain), national courts interpret all of the laws that states write. Can such judicial unitarism bring enough uniformity to the application of the diversity of laws that subnational legislatures enact?

Importance of Judicial Federalism to Legal Systems in the Civil Law Tradition

Outside the United States, among legal systems in the civil law tradition, the judicial structure of a federation can have an empirical effect on the degree of actualized legal uniformity. In countries with legal systems following the civil law tradition, constitutional courts have long issued decisions with binding effects on lower courts, but in their ordinary judicial systems courts do not make decisions that bind other courts. The number of decisions necessarily increases, even among apex courts of states, provinces, and cantons. From one of these apex courts to another we can still observe consistent divergence in judicial philosophy.

The highest ordinary court of the federation can serve as a measurement tool for how much state judiciaries diverge from the jurisprudential ideology of that national apex court. We must make some assumptions, but those simplifications need not oversimplify. These assumptions apply also to common law court systems. Among the apex state

courts, litigants must appeal their cases to the national court at roughly an equal rate. Unequal appellate rates would bias the sample. If the litigants in one state appeal a much smaller percentage of cases, the reversal rate at the national court could be skewed higher or lower. The state apex courts must decide caseloads with relatively identical composition. We need to control for the number, type, and strength of legal support structures in the states (Epp 1998).

The larger the reversal rate of the lower court the farther away its ideology from that of the high court. For example, if the national court reverses 10% of the appeals from one court but 20% of the appeals from a second court, we can assume that the first court's judicial ideology more closely matches that of the national court.

Observations collected according to these assumptions do not exist, but the available data suggest significant variation among state, provincial, and cantonal courts. Examples include courts within less-developed countries such as Brazil (Table 1.1) and more developed countries such as Switzerland (Table 1.2). Dissimilarities among state courts with respect to other judicial outcomes further supports inferring differences in judicial ideology. The highest Länder courts in Germany varied considerably in their use of a 2002 reform that had allowed them to summarily dismiss certain types of civil cases. Germany legislatively reversed the reform in 2011, even though the Constitutional Court had upheld its constitutionality (Nassall 2008).

Table 1.2 - Variations in the Jurisprudential Ideologies of the Highest Brazilian State Courts (2013)			
State	**Percentage of TJ Decisions Reversed by STJ**	**State**	**Percentage of TJ Decisions Reversed by STJ**
Pernambuco	4.8%	Paraná	12.4%
Bahia	6.1%	Maranhão	12.6%
Mato Grosso	6.5%	Distrito Federal	14.6%
Pará	9.4%	Alagoas	16.8%
Paraíba	10.4%	Amapá	19.4%
Roraima	10.4%	Minas Gerais	21.2%
São Paulo	10.5%	Rio Grande do Norte	23.1%
Mato Grosso do Sul	11.0%	Rio Grande do Sul	25.8%
Rio de Janeiro	11.3%	Rondônia	32.2%
Tocantins	11.4%	Santa Catarina	32.9%
Acre	12.2%	Goiás	59.1%
Source: Justiça em Números, Conselho Nacional de Justiça, Brasil (2013) **TJ = of Highest State Court -- STJ = Highest Federal Court of Ordinary Law**			

Table 1.3 - Variations in the Jurisprudential Ideologies of the Highest Swiss Cantonal Courts (*Obergericht des Kantons*) in 2007

Canton	Rate of Reversal of Highest Cantonal Court by Highest Federal Court of Ordinary Law	Canton	Rate of Reversal of Highest Cantonal Court by Highest Federal Court of Ordinary Law
Schwyz	4.1%	Tessin	9.6%
Glarus	5.9%	Thurgau	9.9%
Zug	6.4%	Waadt	10.0%
Neuenburg	7.2%	Nidwalden	11.6%
Schaffhausen	7.3%	Luzern	11.8%
Zürich	7.4%	Aargau	13.3%
Solothurn	8.3%	St. Gallen	13.3%
Graubünden	8.6%	Basel Stadt	13.4%
Freiburg	8.7%	Appenzell AR	13.8%
Bern	8.8%	Uri	14.3%
Basel Land	9.2%	Genf	15.5%
Jura	9.4%	Appenzell IR	16.7%
Wallis	9.5%	Obwalden	36.4%

Source: Beobachter Online 11/26/08, Federal Supreme Court of Switzerland

HOW JUDICIAL FEDERALISM CAN CONTRIBUTE TO THE MEASUREMENT OF CENTRALIZATION IN FEDERATIONS

Halberstam and Reimann (Halberstam, Reimann, and Sanchez Cordero 2012; 2014), with the aid of country specialists, have qualitatively compared the degree of legal unification within twenty existing federations. They consider not only the formalized multilevel distribution of policy-making prerogatives among the legislative, executive, and judicial branches. They also examine the role played by non-state actors, horizontal coordination among component governments, and uniform/model laws and codes.

Most federations have subnational legislatures and executives, so characterizations of subnational legislative and executive powers typically use ordinal or

continuous scales to measure them. The presence of those two branches plays no role in the measurement because the model assumes their existence. An ordinal scale, for example, will indicate if subnational governments have the prerogative to collect property, sales, or income taxes. Subnational governments in one federation can collect all three types, but in another federation they can only collect one type. Characterizations of subnational power use continuous scales less often than they use ordinal ones. A scale could represent the percentage that subnational governments can tax their residents. The central government, for example, proscribes the subnational governments from collecting more income taxes than 20% of the amount that the central government collects. In another federation the constitution limits the amount to 15%.

The measure of judicial federalism is typically more dichotomous; subnational governments have their own judiciaries or they do not. Because most federations lack subnational judiciaries, we cannot assume their presence in the process of measuring the overall centralization of a federation. The presence of subnational judiciaries becomes a powerful indicator of a federation's centralization.

INSTITUTIONAL VARIATION AMONG THE JUDICIARIES OF FEDERATIONS

The institutional architectures of judiciaries in federations manifest considerable variation, but the features involved do not have equal importance to the judicial system's measure of centralization. This section briefly describes some of these elements in order to illustrate the much greater importance of judicial federalism. In comparison to the judicial systems of all other federations, the jurisdictional arrangement of the United States has over time become increasingly idiosyncratic. The U.S. has an entirely separate hierarchy of federal courts parallel to those of its states. Most legal systems do not

automatically remove civil disputes to federal trial courts just because those cases involve diversity jurisdiction. Inferior federal court interpretations of state law could formally compel state courts to make similar rulings, but in the U.S. they do not. As the most decentralized federation in the world, the U.S. unsurprisingly boasts the world's most decentralized judicial arrangement. Yet it might surprise us how little other federations have imitated the decentralized subnational judicial arrangement of that first modern federation.

Other federations have differed from the U.S. example not only because each new federation has adopted more often than not a judicial arrangement more centralized than that of the second newest federation. Switzerland has no federal courts except the apex court for the entire country. Mexico places intermediate federal appellate courts immediately above the apex courts of their states. Some federal systems lack judicial federalism entirely. Federations such as Canada and Venezuela may use the terms "provincial" and "state," respectively, when labeling the courts associated with provinces and states, but those courts belong to the national government.

Table 1.4 - Some Basic Varieties of Judicial Federalism
Regional Federal Courts Monitoring Non-Federal Courts Interpreting Non-Federal Law (Canada, Mexico's direct *amparo*, Canada)
Regional Federal Courts Monitoring Non-Federal Courts Interpreting Federal Law (Mexico's direct *amparo*)
Apex Federal Court Monitoring Non-Federal Courts Interpreting Federal Law (Brazil, Germany, Switzerland, Argentina's *sentencia arbitraria,* federal law cross-vested in state courts in Australia, ECJ)
Apex Federal Court Monitoring Non-Federal Courts Interpreting Non-Federal Law on Non-Constitutional Grounds (Australia, Canada)
Apex Federal Court Monitoring Non-Federal Courts Interpreting Non-Federal Law on Constitutional Grounds (Australia, Argentina, Brazil, Germany, Mexico, Nigeria Switzerland, United States)
Regional Federal Courts Monitoring Non-Federal Executives Administering Federal Law (Austria, India, Spain, Colombia)
Regional Federal Courts Monitoring, on Non-Constitutional Grounds, Non-Federal Legislatures Enacting and/or Non-Federal Executives Administering Non-Federal Law (Austria, India, Spain, Colombia, diversity jurisdiction in the United States, diversity jurisdiction Argentina)
Regional Federal Courts Monitoring, on Constitutional Grounds, Non-Federal Legislatures Enacting and/or Non-Federal Executives Administering Non-Federal Law (United States, Argentina)

No two federations organize their judicial systems the same way, and the architects of their judiciaries select an overall arrangement from an array of alternative institutions and components. At first blush, when we explore the universe of judicial arrangements among federations the organization of each system seems *sui generis*. Some patterns among institutional designs seem to emerge in relation to characteristics such as the legal tradition, geography, and colonial heritage of a given federation; but creating the taxonomy of judicial structures among federations proves no less difficult than making one for the organization of subnational executive and legislative branches.

Explanations for the Creation of Federations But Not for a the Creation of a Federation's Institutions?

Numerous studies have theorized why some political units federate while others remain separate polities or become unitary countries (Dikshit 1971; Parent 2011; Rector 2009; Riker 1964). While these studies provide powerful theories to explain the act of federating, they do not delve into situations where only some branches of government have subnational forms (Riker 1975). If expansionist states prefer federalism to unitarism (Ziblatt 2004), why do so many federations have both non-federal executives and legislatures but unitary judiciaries?

The comparative study of judicial federalism improves and complements existing measurements of decentralization in federations. Federations range from the relatively tight (e.g., India) to the relatively loose (e.g., U.S.). Conceptualizations and measures of such indirect rule abound (Hooghe, Marks, and Schakel 2010), but nearly all of them treat the judiciary as if it did not exist. The social scientific study of federations posits as a dependent variable both the amount (e.g., expenditures or taxation) and nature (e.g., judicial, legislative, executive) of decentralization among federal political systems.

Most conceptualizations of federalism do not treat the judiciary, let alone subnational judiciaries, as something worthy of comment (Rodden 2004; Watts 1998). In one notable exception, Cameron and Falleti argue that full federalism requires the presence of a judicial branch at the state level (Falleti and Cameron 2005). Otherwise, they write, true subnational separation of powers does not exist. The authors do not distinguish between genuine and ersatz judicial federalism. Only in a federation where the subnational governments control their own judiciaries does real judicial federalism exist (e.g., United States, Brazil, or Germany). Federations contain only faux judicial federalism where the subnational judiciaries belong to the states in name only (e.g.,

Spain, Austria, Venezuela, or India). Under such counterfeit judicial federalism, the central government chooses and removes the judges, pays the salaries of those judges, and funds their courts by constructing their buildings, paying their staff, and providing their office supplies.

Institutional Features among Federations that make their Judiciaries Tighter or Looser

We can divide the group of judicial institutions among federations into those that tighten and those that loosen centralized judicial control over the federation. Some of these features also exist in unitary states, but in federations they take on this added purpose.

Institutions Common to both Unitary and Federal Political Systems that Tighten or Loosen the National Judiciary's Control

Limiting access to constitutional review by circumscribing the rules of standing tightens the judicial system. Only actors of the national government can bring cases to the national constitutional court. When governors, states legislators, or state attorneys general bring claims to the national constitutional court, they typically defend the prerogatives of their states. Even though they lack plaintiff access to the national constitutional court, those state actors may participate in the legal proceedings as defendants, when national figures use their plaintiff access to control what they see as state abuses. Still, state actors have less power because they cannot initiate the process.

Centralized constitutional review by the national constitutional court also tightens the central government's control over state judiciaries. If state courts have the ability to review and invalidate state laws in light of the national constitution, the national constitutional court must then take the appeal if it wants to maintain a nationwide

uniform interpretation of the national constitution. When the national constitutional court has the exclusive right to review both state legislation and the actions of governors, they can focus on fewer cases.

The sharpest organizational divide among the judiciaries of federations separates those where the states, provinces, and cantons have their own judiciaries and those federal political systems where they do not. Judicial unitarism has a bigger effect than most of the tightening features common to both federations and unitary polities. The national constitutional prerogatives such as abstract review of state legislation, a priori invalidation of state bills, and docket control all tighten the nature of a federation's judiciary, but the presence of state courts loosens the judiciary by an order of magnitude.

Institutions Particular to Federations that Tighten and Loosen Control

Some of the institutions that tighten or loosen the national judiciary's control over the states only exist in federations. Some designers were sufficiently concerned about the inadequacies of provincial judiciaries that they instituted interlocutory appeals from the apex provincial courts to the federal system before an apex provincial court reaches a final decision. Some systems prescribe that state courts only use national criminal, civil, administrative, or procedural codes.

The presence of regional federal courts taking regular appeals from apex nonfederal courts signifies a preference for greater judicial centralization. This arrangement reduces the number of cases that the national apex court must decide in order to maintain jurisprudential uniformity throughout the country. In these cases the appeal does not need to raise a constitutional issue, but rather, the regional appellate court is simply considering whether the interpretation of ordinary law by the apex provincial

court was incorrect. The important feature here is not whether the regional federal court must permit the appeal before it can take place. The regional federal court may have the institutional ability to deny the privilege of having the apex federal court hear the appeal (e.g., "on leave" or "on writ of certiorari). Rather, so long as the potential for appeal into the federal system exists, the central government can keep tighter control over the jurisprudence of provincial apex courts.

The fact that an apex provincial court has already decided the case almost completely rules out the possibility of geographic diversity jurisdiction. In those countries with federal diversity jurisdiction, rarely do parties from two different provinces agree to hold the trial in one of their provinces rather than in a federal trial court. Nevertheless, even in the United States where parties from two different states can agree to hold the trial in one of those two states, the parties cannot then appeal the case to a federal court simply on the basis of federal diversity jurisdiction. The decision to go provincial at the trial level forestalls changing to the federal system rather than appealing within the provincial system. Instead, the system requires that both parties wait until the exhaustion of all provincial appeals in order to take the case into federal court.

Table 1.5 - Institutional Features in Federations that make their Judicial Systems Tighter or Looser

Centralizing/Tightening	Decentralizing/Loosening
Institutions Common to Both Unitary and Federal Political Systems	
Limited Access	Unlimited Access
Centralized/Concentrated Review	Decentralized/Diffuse Review
Abstract Review	Concrete Review
A Priori Review	A Posteriori Review
Informal or Formal Vertical Binding Precedent (Constitutional or Ordinary Law)	No Vertical Binding Precedent (Constitutional or Ordinary Law)
National Apex Court Has Docket Control	National Apex Court Lacks Docket Control
Federal/National Circuit and District Courts Must Abide by Lateral Federal Precedents	Federal/National Circuit and District Courts Need Not Abide by Lateral Federal Precedents
Institutions Particular to Federations	
Single/Hierarchical Judiciary, Judicial Unitarism	Plural/Coordinate Judiciary, Judicial Federalism
National Judges or Commissions Choose Inferior Court Judges	State Judges or Commissions Choose Subnational Judges
Diversity Jurisdiction	No Diversity Jurisdiction
Diversity Jurisdiction uses Written Federal Law or Federal Common Law	Diversity Jurisdiction uses Written State Law or State Common Law
Federal Circuit Courts Can Take Appeals of the Decisions of Non-Apex State Courts	Federal Circuit Courts Can Only Accept Appeals of the Decisions of Apex State Courts
Apex Federal Courts Can Take Appeals of the Final Decisions of Non-Apex State Courts	Apex Federal Courts Can Only Consider Appeals of the Final Decisions of Apex State Courts
Federal Circuit Courts Can Take Appeals of the Interlocutory Decisions of Non-Apex State Courts	Federal Circuit Courts Can Only Accept Appeals of the Final Decisions of Apex State Courts
State Governments or their Representatives in the National Government do not Participate in the Selection of National Apex Courts Judges	State Governments or their Representatives in the National Government Participate in Selecting National Apex Court Judges
National Code of Judicial Process	State Codes of Judicial Process

SITUATING THE STUDY OF JUDICIAL FEDERALISM WITHIN RESEARCH ON FEDERALISM AND SCHOLARSHIP ON JUDICIAL SYSTEMS

This project builds upon and complements the growing wave of comparative research on subnational courts. Cross-national comparative studies of subnational and non-federal courts exist, but they differ from this dissertation in their aims and scope. The task of explaining political phenomena presupposes the possession of accurate observations. Research has usefully described, conceptualized, and measured the institutions involved in judicial federalism. W.J. Wagner's *The Federal States and Their Judiciary* focuses overwhelmingly upon the United States, adding to it only Argentina, Australia, Brazil, Canada, and Mexico (Wagner 1959). And it does not investigate the causes of institutional variation among those federations.

More recent studies have enhanced the conceptualization and measurement of both subnational courts and judicial federalism, and other research has linked the analysis of subnational courts to analyses of subnational legislatures and executives. Casañas-Adam subtly conceptualizes varieties of judicial federalism and then compares the inferior and subnational court systems of Spain, the United States, and the United Kingdom (Casañas-Adam 2009). Joan-Josep Vallbé constructs a useful index of regional judicial authority to complement the tool that Marks, Hooghe, et al. have created for the executive and legislative branches (Hooghe et al. 2015; Hooghe, Marks, and Schakel 2010; Vallbé 2014), But, just like the "Regional Authority" index, Vallbé offers useful descriptions and conceptualizations rather than explanatory theories. And it includes only a few contemporary European cases, and it does not incorporate all of the attitudinal, strategic, and legal influences on judicial behavior.

Another set of studies has examined the dynamic behavior of political actors in the context of the static institutions that those earlier analyses described, conceptualized,

and measured. Many of them insightfully compare either one or a few political systems in order to explain political outcomes (Brinks 2007; 2009; Castagñola 2012; Chávez 2004; Leiras, Tuñón, and Giraudy 2015) Judicial and other institutions can affect the decisions of political actors, but political actors can also change judicial institutions. Research has valuably examined subnational judiciaries as preexisting institutions and offered powerful theories to explain variations in their reform (Ingram 2009). Hayward, moreover, explains why certain countries have ceded some judicial power to indigenous, linguistic, and ethnic minorities; but those subnational court systems do not have a territorial basis (Hayward 2015).

Only one other project has noted the relationship between the way that a federation forms and the nature of its judiciary:

> In fact, due to factors such as, among others, uniformity in interpretation, centripetal tendencies, legal and political culture, judicial power in federal countries is strongly interconnected even when it is divided between two levels of government. To put it simply: among the functions analysed in this chapter (constitutional, legislative, administrative and judicial), the latter is, overall, the least autonomous, and in several federal systems the judiciary is not even divided between the national and the subnational level: this is the case, for instance, in Austria, Belgium, Russia, South Africa and Spain.
>
> Normally, the historical formation of the state plays a decisive role in determining the division of judicial powers: aggregative federations, where a judiciary existed in the subnational units prior to the establishment of the federal compact, have normally kept that judiciary, while devolutionary federal systems, departing from a unitary judiciary, as a rule did not transfer judicial powers to the subnational level, except for some organisational aspects. The historical pattern also explains why in the United Kingdom, for instance, Scotland kept its own judiciary and even a partly separate legal system: these were in place at the time of the Act of Union 1707, by which Scotland and England were unified in the Kingdom of Great Britain. (Palermo and Kössler 2017, 159-160)

This dissertation goes beyond these insights and systematically evaluates them.

WHY STUDY THE ORIGIN OF JUDICIAL FEDERALISM RATHER THAN ITS EFFECTS?

As with the examination of any institution, we obtain only an incomplete understanding of its current arrangement, evolution, operation, and significance without first addressing the question of its origins. Variation in the arrangement of the judiciary in federal countries raises intriguing questions, none of which have received satisfying answers (Swenden, Loughlin, and Kincaid 2013). We can describe and categorize subnational judiciaries, theorize and measure their effects, but the following chapters show that we should start by explaining their origins. The task of classifying the varieties of judicial federalism becomes easier in the context of a better understanding of its causes. We can identify its effects more clearly by knowing the nature of its inception political systems. The following pages explore the operation and significance of judicial federalism through the lens of its origin.

The Goal of this Dissertation

This project proposes an answer to the question of the origin of judicial federalism. What accounts for the variations in the original arrangement of the judiciary in federations? Or more specifically, why does one process of federating create a political system that has a non-federal judiciary in addition to its centralized judiciary, while another process of federating creates a political system that has no genuinely non-federal judiciary at all? This dissertation answers those questions.

An Institutionalist Explanation for the Origin of Judicial Federalism

The nature of the federating process determines the presence of peripheral judicial systems. Federal origins fall into two types: "coming together" and "holding together."

Judicial federalism emerges during the creation of a federation when the federating process involves the integration of multiple political units. When the birth of a federation consists of a unitary political system devolving powers to new subnational governments, the establishment of judicial federalism rarely occurs.

Evaluating Alternative Hypotheses

I contend that social, economic, historical, and geographic types of fragmentation do not matter to the emergence of judicial federalism. They are neither sufficient nor necessary causes of variation in the arrangement of court systems. Even if structural factors reinforce each other because their distributions and concentrations have matching geographic locations among a federation's regions, they do not influence the nature of a federation's judicial system. Institutions do not have to coincide with structural factors in order to play a decisive role in the type of judiciary that emerges from the process of creating a federation. Institutions are both a sufficient and necessary cause of judicial federalism.

The Framework of this Dissertation

The chapters that follow this Introduction constitute an evidence-based demonstration of that argument. Chapter One presents the theory and argument, concluding with a presentation of qualitative and quantitative results. Chapter Two explains and justifies this project's methodology that comprises the decisions made about both conceptualization and measurement. Chapters Three through Six consist of qualitative case studies of Brazil, the Central American Federation, Germany, and India. The Conclusion recaps those chapters, explains some important exceptions to the overall

argument, and points toward some additional possibilities for further and fruitful research on judicial federalism, its origin, operation, and significance.

Before becoming a cause, political institutions are an effect; society produces them before being modified by them.

—Francois Guizot[8]

The more it changes, the more it is the same thing.

—Jean-Baptiste Alphonse Karr[9]

[8] "*Avant de devenir cause, les institutions sont effet; la société les produit avant d'en être modifiée ; et au lieu de chercher dans le système ou les formes du gouvernement quel a été l'état du peuple, c'est l'état du peuple qu'il faut examiner avant tout pour savoir quel a dû, quel a pu être le gouvernement*." (Guizot 1836, 83; 1823, 87)

[9] "*Plus ça change, plus c'est la même chose.*" (Karr 1849)

Chapter 2

Why the Political and Judicial Institutions that Preexist a Federation Foreshadow the Arrangement of that Federation's Judicial Institutions

INTRODUCTION

A Contest that Decides the Formal Institutions of a Future Federation

More decisively than any other factor, the institutional configuration that preexists the founding of a federal political system determines the arrangement of that federation's judiciary. The variation in that outcome, in fact, only depends on those preexisting institutions. Those *ex ante* institutions shape a future federation's architecture by altering the relative strength of the factions opposed to each other regarding the nature of that federal system's institutional framework. When those blocs gather together to form the official body that will choose that federation's formal institutions, the contest between those factions for total dominance gives way to debate and negotiation; each bloc realizes that it cannot achieve everything that it wants if the federation is to exist at all.

Among these groupings in the constituent assembly, two of the most important rival each other because they disagree over the proper distribution of power between the central and peripheral governments. The centralizers want the state's institutional arrangement to empower the national government with tight control over the country's entire political system, including its subnational governments. The decentralizers prefer a state structure that endows the central government with only loose control of the country's subnational political systems. As one of the key institutions that federations use to tie themselves together, the judiciary is at the center of the wider conflict between the centralizers and decentralizers. In the end, pre-existing institutions determine the winner of their disagreement.

The Contest Over a Federation's Measure of Centralization as Part of the Larger Contest Over All of that Federation's Institutions

Creating a federation inherently involves certain institutional changes without which the political system remains only a group of separate countries, a confederation, or a unitary state. But beyond those necessary alterations, any particular combination of decisions about that federation's various institutions gives rise to a particular comprehensive arrangement. That specific configuration places the federation somewhere along the continuum that stretches between the most centralized to the least centralized federations conceivable. The most extreme proponents of centralization hope for a federation only slightly more decentralized than a unitary state, while the most extreme proponents of decentralization hope for a federation only marginally more centralized than a confederation.

The Influence of both Preexisting Institutions and Salient Cleavages on the Balance of Power in the Constituent Assembly

This chapter explains how certain arrangements of institutions, both immediately before and during the birth of a federation, determine a balance of power among factions. In the constituent assembly, the influence of these institutions overcomes the influence of structural cleavages. For the sake of the clarity that greater simplicity provides, let us imagine the following stylized account. Ideological, social, and economic cleavages regarding a prospective federation's political institutions split the body of negotiators in various crosscutting and coinciding patterns. At one extreme of a continuum, language, religion, and socio-economic status coincide one hundred percent throughout the population. Any two individuals of the same ethnicity also always speak the same language and subscribe to the same religion. And everyone speaking that language also

shares both that same ethnicity and that same religion. The size of these two populations can differ, but no cleavage cross-cuts another.

Table 2.1 - A Population with Three Coinciding/Reinforcing Cleavages	
French Poor Catholic	English Rich Protestant

In the extreme example at the opposite end of that continuum, those three characteristics crosscut each other throughout the population. Any individual of a certain ethnicity almost always does not speak the same language nor subscribe to the same religion. And almost everyone speaking that language does not share that same ethnicity nor believe in that same religion. If only three characteristics describe the population, each one of them splits the other two in half, creating eight different combinations of various sizes.

Table 2.2 - Population with Maximum Overlapping Cleavages	
French Poor Catholic	English Rich Protestant
French Poor Protestant	English Rich Catholic
French Rich Catholic	English Poor Catholic
French Rich Protestant	English Poor Protestant

Cleavages like those translate into blocs of representatives in the constituent assembly that disagree about how to arrange each facet of the new political system. It is

reasonable to expect these cleavages to affect the centralization of the federation by their effect on the balance of power in the assembly.

The Influence of Salient Cleavages on a Future Federation's Measure of Centralization

Of those blocs of delegates in the constituent assembly, two of the most important disagree over the proper distribution of power between the central government and the peripheral governments. One group, for instance, may want an entirely nationalized police force while their opponents in the constituent assembly want an entirely regionalized police system. A different division in the constitutional convention, meanwhile, might pit those who want to make labor law a national policy prerogative, on the one hand, against those who want to make it a subnational policy domain, on the other.

For any individual member of the assembly, the preference to decentralize or centralize one of those policy prerogatives might coincide with the preference to decentralize the other policy prerogative. A group of representatives, for example, wants decentralization for both, or centralization for both, but not decentralization for one issue and centralization for the other issue. Conversely, that same group of representatives might instead hold that just mentioned alternative combination of preferences, i.e., centralizing policy in one area but decentralizing it in the other. The existence of a coinciding cleavage does not require symmetry for each issue along the continuum of centralization. The key aspect is not the substance of those preferences, but rather, it is whether all of the proponents of a certain policy also constitute each and every proponent of another policy.

Contesting the Measure of Centralization in the Judicial Branch of a Future Federation

Within that larger conflict about the nature of a federation's centralization, two groups disagree whether the national judicial system should have tight or loose control over subnational governments. One bloc prefers a centralized judiciary while the other wants it decentralized. More specifically, the two groups disagree about including a set of subnational judicial systems—separated from the national judiciary and independent from both the executive and legislature of the central government. Constituent assembly members who prefer centralization or decentralization with respect to legislative and executive power do not necessarily desire the same thing for the judiciary. As we will see below, antecedent institutions tip the balance of power in the constituent assembly toward the faction that wants to retain the preexisting judicial framework, centralized or decentralized, and embed it within the federation's overall institutional arrangement.

The Influence of Preexisting Institutions on a Future Federation's Measure of Judicial Centralization

As this section explains, the preexisting institutional configuration of the judiciary acts like an anchor, providing one side with the leverage to maintain that *ex ante* judicial architecture in the new federation. The shape of that federation's judiciary depends on the nature of its founding moment. A devolutionary founding, such as Spain's, preserves the unitary judicial system of the preceding state, but the process does extract pieces of the unitary state's legislative and executive systems and redistribute them among new subnational governments. An integrative founding, such as Argentina's, preserves almost every part of the judicial systems that belonged to the states that preexist the federation, but the process transfers significant parts of legislative and executive power from those states to the federation's central government. Again, the preceding scenario constitutes a

simplification rather than a set of descriptive observations. The case studies in later chapters, however, do suggest some examples.

A Preview of this Chapter

The following sections of the chapter present this dissertation's theory and empirical findings. Part One of this chapter points out some potential misunderstandings in conceptualization that cannot wait for the chapter on methodology because they would otherwise hinder the exposition of the central theory. First, it clarifies the difference between integrative and devolutionary federalism. Second, it illustrates the importance of properly conceptualizing a "federal moment," i.e., the period in time in which a federation comes into being. The discussion specifically touches on conceptualizing when a "federal moment" begins and when it ends. Part Two spells out the explanatory benefits of considering the two types of federation ("coming together" vs. "holding together") in tandem. Part Three describes the balance of power's role in determining the institutional choices made during moments of federal formation.

Part Three also distinguishes the factions in the constitutional convention, on the one hand, from the political units that the assembly's members represent, on the other. The factions that favor either decentralization or centralization do not necessarily correspond to the political units creating the federation. The influence of ideas about the proper degree of centralization can weaken or supersede the power of interests. A certain degree of centralization may best serve the interests of a political unit and yet for ideological reasons the political unit favors a different degree of centralization. While this disjunction between interests and ideological preferences affects the outcome for other institutions, observationally, it does not affect whether the judiciary is centralized or decentralized.

Part Four explains how and why the creation of subnational judiciaries differs from that of subnational executives and legislatures. While it typically affects executive and legislative prerogatives by altering their degrees of centralization, the balance of power has a dichotomous effect on judicial institutions. Federations, of both the "holding together" and "coming together" varieties, rarely incorporate subnational legislatures or executives apart from each other. Devolutionary and integrative federations most commonly create state legislatures and executives simultaneously. The equilibrium of power between centralizers and decentralizers causes variations among federations in the number and type of prerogatives possessed by subnational legislative and executive branches. But their actual existence rarely hinges on that balance of power. But judicial institutions display less variation between complete centralization and complete decentralization.

When present, subnational judicial institutions vary in some ways that are analogous to those of legislatures and executives. The previous chapter spelled out many of these: diversity jurisdiction, federal circuit courts placed between state supreme courts and the national supreme court in the hierarchy of appeals, and docket control by the national supreme court. Those differences do include differences in degree in addition to differences in kind. But in comparison to the executive and legislative branches, the judicial branch in federations exhibits far more variation in the most basic way possible. A federation's judiciary is decentralized or centralized because a subnational judiciary is either present or absent. The balance of power in the constituent assembly enables the centralizers to achieve a fully centralized judiciary, or it empowers decentralizers to create a fully decentralized judiciary. Either the central government controls the judiciary "all the way down" to the parts located in the states, or the states control their own judicial systems.

Part Five moves the argument forward, from the previous examination of influences on the balance of power in the assembly, to an examination of existing institutions' influence on the balance of power in the assembly. It considers both institutional variations unique to federations and those common to all political systems. The argument then shifts in Part Six from the balance of power's general effect on all institutional choices to a more particular level of causation: the balance of power's influence on a federation's measure of centralization. It suggests that the complexity of the negotiations causes any analysis of plausible influences on the balance of power to muddy the conceptual distinction between leverage and preferences. But one side of the constituent assembly's centralism/decentralism debate does secure its institutional preferences. That faction's greater leverage enables it to incorporate its choices in the new federation's institutional framework.

These decisions about centralization most commonly involve both the size and nature of subnational legislative and executive prerogatives. What can the states tax? In what areas of public policy can they write laws? Can they borrow money? This level of analysis connects the balance of power not only to the selection of a federation's institutions but also to those features that make a federal polity's centralization lesser or greater. The nature of the variation in judicial institutions differs from the nature of the variations in executive and legislative institutions. Of course, the negotiators in the constituent assembly can misjudge the preferences and commitments of their counterparts on the other side, and Part Six ponders that possibility as well.

After describing, in Parts One through Six, the balance of power and how it gives rise to a federation's unique institutional framework, Part Seven outlines how *ex ante* judicial institutions affect that balance of power specifically. The equilibrium of power and preferences, reached in the negotiations between those two groups, decides the

contours of that federation. At the most concrete level of causality, the presence of diffuse judicial and political institutions at the founding of a federation gives rise to a plural judiciary for that new federal political system. The existence of a unitary judiciary, before and during the process of federating, forecloses the emergence of a dual judiciary.

In this way, the presentation of the explanation moves in concentric circles of conceptualization: from the balance of power, to institutions generally, to judicial institutions in particular. After detailing the balance of power and how it works, it describes how the *ex-ante* judicial institutions affect that balance of power in the negotiations that decide the contours of the federation. Part Eight highlights how the judicial branch differs from the legislative and executive branches by its tendency toward complete decentralization or complete centralization. Part Nine of this chapter briefly adumbrates how apparent exceptions to the dissertation's central thesis in fact counterintuitively support it. But the full discussion of these exceptions takes place in the dissertation's concluding chapter.

Part Ten outlines several alternative causal hypotheses. Part Eleven illustrates the inadequacy of structural explanations such as those based on demographic, geographic, and economic factors. These plausible influences do correlate somewhat with the variation observed among the judiciaries of federations. But they manifest a weaker association with those outcomes than do the *ex ante* judicial and political institutions. In other words, those structural factors may change the balance of power in the contest over the degree of centralization in a federation; but they cannot overcome the decisiveness of the preexisting judicial arrangement's influence on the new federation's measure of judicial centralization.

PART ONE: THE NUTS AND BOLTS OF THE THEORY

"Coming Together" vs. "Holding Together" Federations

Before addressing the contest between the centralizers and decentralizers that generates a balance of power, this section clarifies the distinction between the two types of federal formation. This section also explains the difference between integrative and devolutionary federalism in order to make sense of the role of institutions in the formation of federations. Alfred Stepan defines "coming together" federations as those that involve a "[l]argely voluntary bargain by relatively autonomous units [coming] together so that by pooling sovereignty but retaining their identity they can increase their security" (Stepan 2004, 33-34). Meanwhile, "holding together" federations result from a primarily "consensual parliamentary decision to attempt to hold together a unitary state by creating a multinational federal system" (Stepan 2004, 36). Stepan readily admits the highly stylized nature of both these concepts, but most cases do conform roughly to these idealized types.

When he highlights the distinction between these two types of federalism, Stepan has company. Independently, Koen Lenaerts coined the term "devolutionary federalism" (Lenaerts 1990, 206): "A constitutional order that redistributes the powers of a previously unitary state among its component entities; these entities obtain an autonomous status within their fields of responsibility." This idea corresponds to Stepan's "holding together" federations. Lenaerts also originated the term "integrative federalism": "A constitutional order that strives at unity in diversity among previously independent or confederally related component entities" (Lenaerts 1990, 206) "Integrative federalism" corresponds to Stepan's "coming together" federations. Stepan invented the new terms

without knowing about Lenaerts' probably because the literature on law and research in political science exist in parallel. This project uses these terms interchangeably.

Table 2.3 - Types of Federal Formation N=65

Holding Together **N=33**	***Coming Together*** **N=32**
Austria (1920), Austria-Hungary (1867), Belgium (1993), Bolivia (2009), Brazil (1834), Central African Republic (2004), Chile (2019), China (1954), Colombia (1853), Comoros (1978), Czechoslovakia (1968), Democratic Republic of the Congo (1964; 1994; 2006), Ecuador (2008), France (1982), India (1949), Indonesia (1949), Italy (1999), Kenya (1961), Malaya Federation (1957), Nepal (2015), Pakistan (1956), Peru (2003), Philippines (1946), Russian Federation (1992), South Africa (1994), Spain (1970), St. Kitts and Nevis (1983), Sudan (1972), Uganda (1962), USSR (1923), Yugoslavia (1946)	Argentina (1860), Australia (1901), Bosnia-Herzegovina (1997), Brazil (1891), Cameroon (1961), *Canada (1867)*, Central American Federation (1821), Colombia (1815), Ethiopia (1994), Ethiopia-Eritrea Federation (1952), European Union (1992), Federal Republic of Yugoslavia (1992), German Empire (1871), Iraq-Kurdistan (2003), Malaysia (1963), Mali Federation (1960), Mexico (1824), Micronesia (1979), Nigeria (1960), Norway and Sweden (1815), Peru-Bolivia Confederation (1836), Poland-Lithuanian Commonwealth (1569), Rhodesia and Nyasaland (1954), Somalia (2012), South Sudan (2005), Sudan (2005), Switzerland (1848),UAE (1971), United States (1789), Venezuela (1811), West Indies Federation (1958), ZSFSR (1922)
Italicized: *Hybrid of "Coming Together" and "Holding Together"*	

The relationship between the two types of federation and the two types of judicial arrangement is relatively intuitive. Moments of "holding together" favor centralization because they both induce a stronger desire for centralization among more of the negotiators and give the centralizers more power in the negotiations. Decentralizers are more willing to settle for executive and legislative centralization without demanding judicial decentralization. More centralizers means the balance of power is more likely to favor centralization. In its purest and most idealized form, "holding together" involves the federalization of a unitary state such as Spain, Belgium, or France. Many of the

negotiators see themselves first and foremost as national officials rather than as representatives of regional interests because the system has not previously recognized regional interests. The negotiators may have achieved their positions through local elections, but their expectations for the future involve holding office in national political institutions because they have never known anything else.

In addition to fomenting a desire for relative centralization among the negotiators, the process of "holding together" also provides more power to the centralizers. The status quo is the unitary state, and the decentralizers will only be able to overcome the inertia of existing institutions by expending resources. Creating something new is always more difficult than maintaining the status quo. New regionalized legislatures and executives will need facilities, staff, salaries, and the basic instruments necessary to enacting and enforcing laws. These subnational governments will have the ability to raise revenues through local taxation, but the collection of taxes implies the enactment and enforcement of local tax laws. Those who intend to be part of the central government recognize that the regionalization of the legislative and executive functions of government will likely require transferring the tax revenues of the central government to the peripheral governments. The centralizers do not want to transfer funds from the center to the periphery. On the other hand, the centralizers know that allowing the local governments to collect their own taxes directly will at least indirectly compete with their ability to collect funds for the central government. Either way, the creation of regional judiciaries will involve additional tax collection whether those revenues are collected by the center or by the periphery.

Table 2.4 - Types of Judicial Arrangements in Federations N=65	
Centralized **N=31**	***Decentralized*** **N=34**
Austria (1920), Belgium (1993), Bolivia (2009), Brazil (1834), Cameroon (1961), *Canada (1867)*, Central African Republic (2004), Chile (2019), Colombia (1853), Comoros (1978), Democratic Republic of the Congo (1964; 1994; 2006), Ecuador (2008), France (1982), India (1949), Indonesia (1949), Italy (1999), Kenya (1961), Malaya Federation (1957), Malaysia (1963), Nepal (2015), Pakistan (1956), Peru (2003), Philippines (1946), Russian Federation (1992), South Africa (1994), Spain (1970), St. Kitts and Nevis (1983), Sudan (1972), Uganda (1962)	Argentina (1860), Australia (1901), Austria-Hungary (1867), Bosnia-Herzegovina (1997), Brazil (1891), Central American Federation (1821), China (1954), Colombia (1815), Czechoslovakia (1968), Ethiopia (1994), Ethiopia-Eritrea Federation (1952), European Union (1992), Federal Republic of Yugoslavia (1992), German Empire (1871), Iraq-Kurdistan (2003), Mali Federation (1960), Mexico (1824), Micronesia (1979), Nigeria (1960), Norway and Sweden (1815), Peru-Bolivia Confederation (1836), Poland-Lithuanian Commonwealth (1569), Rhodesia and Nyasaland (1954), Somalia (2012), South Sudan (2005), Sudan (2005), Switzerland (1848),UAE (1971), United States (1789), USSR (1923), Venezuela (1811), West Indies Federation (1958), ZSFSR (1922), Yugoslavia (1946)

Pinpointing the Beginning of the Federalization Process

Before proceeding, it is necessary to make a conceptual clarification as to the beginning and end of a process of federalization. We want to avoid removing interesting questions by answering them inadvertently through conceptual fiat. In some cases, deciding when the process begins is crucial to determining whether the process is one of "coming together" or "holding together." For example, if we only examine the formal constituent assembly that approved the Indian constitution, then the Indian case clearly looks like an instance of "holding together." Stepan, for one, draws this conclusion because all of the negotiations with the princely states were complete by the time the constitutional assembly convened. With its centralized judiciary, it conforms to the expectation that moments of "holding together" lead to centralized judiciaries.

Alternatively, if we date the beginning of the Indian process further back to the time when the British government made it clear that India would become an independent country, then the process looks like an instance of "coming together." The Indian government attempted but failed to hold the provinces that would become Pakistan within the fold. Likewise, the Indian government had to negotiate with the princely states to convince them to remain part of greater India. If we date the beginning of the federalizing process to the years before Indian independence, then the Indian case violates the expectation that moments of "coming together" lead to centralized judiciaries.

This project adopts modes of conceptualization and measurement that attempt to include the full course of the federalizing process. The process begins when the old ex ante political system ends or when the people of the political units have enough information to know that it is going to end. Hence, the Spanish American cases of Argentina, Colombia, Gran Colombia, Mexico, and Venezuela begin with the declarations of independence and the ensuing wars. On the other hand, the Indian process begins when the British formalize their process for decolonizing the Indian subcontinent that included not only what would become present day India but also present day Pakistan and Bangladesh. Federalizing processes need not be purely of the "coming together" or "holding together" types, but rather, they can pass through periods more dominated by one type than the other. For instance, in the Indian case, the period during which the central government negotiated the inclusion of the princely states, and the period when the Muslim League still participated in the beginnings of the constituent assembly most closely reflect the "coming together" type. On the other hand, once the partition began and the negotiations with the princely states were completed, the "holding together" phase took place. Nevertheless, one type dominates. In the case of India, the "holding together" plays a larger role than "coming together."

The Need to Avoid Confusing Geography with Process

We must also avoid the mistake of confusing the "holding together" of physical territory with the institutional process of "holding together." A number of "coming together" cases according to Stepan are also cases where the separated political units were once part of a centralized government. While it makes sense to use what will be called "territorially aggregative federalism" interchangeably with "integrative" or "coming together" federalism, it is mistaken, albeit understandable, to conflate "territorially preservative federalism" with "devolutionary" or "holding together" federalism. Since using the term "territorial holding together" might be confused with Stepan's "holding together" and Lenaerts' "devolutionary," the analysis here does not use any portion of their terms when speaking of "territorially preservative federalism." Likewise, it does not use any portion of Stepan's "coming together" or Lenaerts' "integrative" terminology to refer to "territorially aggregative federalism."

The Spanish American colonies are the prime examples of the difference between what could be called "territorially preservative federalism" and "holding together" federalism. The category of "territorially preservative federalism" encompasses examples of both "holding together" and "coming together" federalism. Territorially, the transformations of the Spanish American colonies into independent countries are moments of preservation, but in terms of process they are clearly examples of "coming together" federalism. Relatively little time passed between both their declarations and wars for independence, on the one hand, and their emergence as the countries that exist today, on the other. Admittedly, these moments of "territorially preservative federalism" did not preserve each colonial administrative unit in its entirety. Most *audiencias*, *capitanías*, and *reinos* stayed in one piece during the process of becoming countries, but none of the larger administrative units called *virreinatos*—each of which encompassed

more than one of the *audiencias*, *capitanías*, and *reinos*—stayed in one piece to become a country.

Just prior to independence, the territories that were to become Argentina, Colombia, Central America, Gran Colombia, Mexico, and Venezuela existed as separate colonial entities. After independence, regions that Spain ruled became disintegrated. This distinction does not mean that the former borders did not matter, but rather, it means that no central authority held them together any longer. During the fight for independence and in its immediate aftermath both the most recent and slightly less recent borders of the colonial political entities did act as templates for the borders of the new countries. Nevertheless, the most important colonial boundaries were those that gave rise to contemporary countries.

During the colonial period, orders originated with the highest offices in the colonies, but the royal government arranged these hierarchies geographically. The Viceroyalty of Rio de la Plata did not give orders to the province of Antioquia in present day Colombia. The province of Cartagena in present day Colombia did not receive its orders from the *Audiencia de Quito* in present-day Ecuador. Venezuela was the Captaincy General of Venezuela from 1777 until independence. In addition, these borders changed considerably during the late 18th and early 19th centuries. The Viceroyalty of Nueva Granada in 1790 encompassed all of present-day Colombia, Venezuela, Panama, and Ecuador. This territory corresponds to the same borders as the failed country of Gran Colombia. By 1810, the Viceroyalty consisted of only present-day Colombia and Panama. The ephemeral existence of Gran Colombia in comparison to the more permanent creation of Nueva Granada (Colombia) suggests that, while the older colonial territorial arrangements still held some influence, the more recent colonial structures were more decisive in determining the boundaries of these new countries.

The Importance of Pinpointing the End of the Federalization Process

Dating the end of the federalizing process is generally less difficult but nevertheless sometimes confusing. For example, the end of the Indian process, the adoption of the 1950 constitution, would be the same whether we date the beginning before the exit of the British or at the elections for the constituent assembly in 1946. Nearly all of present-day India, barring Jammu and Kashmir, was part of India in 1950. Even though India has amended its constitution numerous times, and even though it has divided some of the original states into smaller states, India's process was truly over in 1950.

Other instances manifest greater ambiguity. Argentina, for instance, is a more complicated case with respect to the end of the process of federating. While all but one of the Argentine provinces adopted the confederal constitution in 1854, the province of Buenos Aires remained separate until 1860, and only after a subsequent battle was it clear that national integration was complete. Buenos Aires was both the most prosperous and most populated province at the time; saying that it was simply an addendum to the existing federation misrepresents its significance.

Pinpointing the end of the federalization process is also important to determining the size of the set of cases. The Colombian and Venezuelan Constitutions of 1811, for instance, did not last long since the Spanish armies re-conquered those territories in 1816 and 1812 respectively. Nueva Granada (Colombia) in 1819 and Venezuela in 1817 ultimately "re-achieved" independence. In neither case did political leaders adopt a new constitution until that of the centralist Gran Colombia in 1821. Granted, a formal compact, adopted in 1819, did outline what would become this new constitution. Hence, both Colombia and Venezuela, throughout the war for independence, retained their 1811 constitutions, even if those constitutions were not in full force because of the chaos. In

fact, when Venezuela declared the second (1813) and third (1817) republics it did not adopt a new constitution, but rather, it reinstituted that of 1811. In this case, the ending is relatively straightforward, even if we might quibble about when the federations actually ended. Each constitution of 1811 did not change after 1811, so the federalization process both began and ended in 1811.

Other cases involve multiple stages and therefore the most appropriate way to characterize the process is as one process rather than as several. The North German Confederation preceded the German Empire (1871). The construction of the North German Federation so influenced the structure of the German Empire, that it would be incorrect to count them as two separate cases. It would be unusual for an existing federation to merge with additional territories and generate a unitary state. The constituent political units of the preexisting federation do not have any incentive to capitulate their power to the center. Institutions are sticky.

A federation ends when it becomes a unitary state. If a federation ends, then that country can experience more than one moment of federalization. Moreover, the types of federalization can vary. Colombia, for example, experienced "coming together" federalization in 1811 but "holding together" federalization in 1991. Once a country becomes a federation it would be wrong to count an immediately subsequent federation as a brand-new moment of federalization. Hence, while it would be accurate to call Venezuela's 1811 and 1989 moments separate, the 1999 constitution is not a separate moment because Venezuela was already federal at that point. Counting the 1999 constitution would be akin to double counting. This deepening of federalism in the 1999 constitution does not constitute the end of a process begun in 1989, but rather, the federalization process began and ended in 1989. The terminus of a federation can take one of three forms: there must be 1) a moment of centralized government (Colombia in

1886), or 2) a moment when the country gains full self-rule or independence from a colonial power (e.g., Nigeria in 1959), or 3) where a federation breaks up into separate countries (Yugoslavia from 1991-1992).

PART TWO: WHY CONSIDER BOTH INTEGRATIVE AND DEVOLUTIONARY FEDERALISM?

Combining the analyses of devolutionary and integrative types of federations might help us understand the motivations of the delegates in their respective constituent assemblies (Tables 2.5 and 2.6). It could provide explanatory leverage for the choices that they make regarding the legislative, executive, and judicial branches at both the national and the subnational levels. In order to do this, however, we must first stipulate that the founders of these federations do not leave judicial institutions the way that they find them simply because those institutions already exist. We assume that centralizers seek maximal centralization within a federation in terms of breadth and depth. They want both to centralize all three branches and to centralize each branch as much as possible. We also assume that decentralizers seek maximal decentralization within a federation in terms of breadth and depth. They want both to decentralize all three branches and to decentralize each branch as much as possible.

Tentative Insights from "Holding Together" Moments

When we explore moments of "holding together" federating, two possibilities appear (Table 2.5). The dearth of judicial decentralization during devolution might suggest that, at least in the opinion of the opponents of decentralization, the judicial branch matters more than the executive or legislative branches. National elites believe that the capitulation of judicial power to the states will prevent the central government

from engaging in certain activities, such as monitoring state governments, maintaining jurisprudential uniformity, and preserving the integrity of the country.

In the process of turning a unitary state into a federation, national elites are perhaps less disinclined to relinquish some legislative and executive prerogatives than judicial powers to the new states, cantons, or provinces that they are creating. Alternatively, that scarcity of judicial decentralizations—specifically those absent from processes involving the devolution of both executive and legislative prerogatives—could imply that the proponents of decentralization care more about the powers to write and execute law (as well as the powers to tax and spend) than they do about the power to apply, interpret, and judge according to law. The decentralizers would prefer the devolution of all three branches of government, but, when forced to choose, they choose the executive and legislative branches over the judicial branch.

Two hypotheses emerge from observing these "holding together" moments. Political leaders who want to maintain as much centralization as possible draw the line at permitting the creation of peripheral judiciaries. If, in order to maintain its integrity, the country must devolve power to new subnational political units, those prerogatives will only take the form of writing and executing law. The existence of a provincial judicial branch typically requires the preexistence of a provincial legislative or executive branch. But why stop at peripheralizing only executive and legislative power? Their devolution of legislative and executive power does not transfer all of the central government's prerogatives and policy domains to the peripheral governments. Why not also decentralize judicial power by a matter of degrees? They seem to covet judicial power more than they value legislative or executive power.

At first blush, those in favor of decentralization seem to prioritize the acquisition of legislative and executive power more than that of the judiciary. Why would

centralizers care more about the judiciary than the decentralizers? That apparent divergence in preferences may actually reflect the simple fact that a peripheral judiciary rarely exists without the concomitant presence of a peripheral executive or legislature. How do we know that the decentralizers actually care about the judiciary less than they do about legislative and executive capabilities? A look at another type of federal formation, i.e., moments of uniting rather than devolving, suggests a solution to that conundrum.

Tentative Insights from "Coming Together" Moments

Complete judicial centralization almost never takes place when separate countries join to form a federation (Table 2.6). When the political units combine, they acquiesce to the creation of a national supreme court, at the very least, but they retain their separate judicial systems. The thirteen American states (the periphery) did not capitulate control over their judiciaries to the newly formed federal government (the center) in 1789, even though they agreed to a Supreme Court and the potential for federal courts inferior to it. It would seem then that the advocates of decentralization want control over at least some judicial power more than they want legislative or executive power, but they settle for the latter. Whether they represent the center or the periphery during the birth of a federation, founders do not surrender control over the judiciary to the same degree that they cede parts of the legislative and executive functions of government. The locus of control over the judicial function has greater inertia than those of the legislative and executive functions.

Combining the Insights of Devolutionary and Integrative Types of Federating

Together, the insights gleaned from "holding together" and "coming together" federations may provide a more convincing account of the motivations held by the participants in the constituent convention. They make it clear that in both integrative and devolutionary federal moments the centralizers and decentralizers want their preferences for the judiciary achieved more than they want them obtained for the executive and legislature.

Table 2.5 - Devolution

Judicial Centralization	Centralizers care more about the judiciary than they do about the other two branches and therefore do not agree to its decentralization.	Decentralizers care less about the judiciary than they do about the other two branches and therefore do not insist on decentralizing it.
Judicial Decentralization	Centralizers care less about the judiciary than they do about the other two branches and therefore permit its decentralization.	Decentralizers care more about the judiciary than they do about the other two branches and therefore decentralize it.

Table 2.6 - Integration		
Judicial Centralization	Centralizers care more about the judiciary than they do about the other two branches and therefore do not permit it to remain decentralized.	Decentralizers care less about the judiciary than they do about the other two branches and therefore do not insist on keeping it decentralized it.
Judicial Decentralization	Centralizers care more about the judiciary than they do about the other two branches and therefore do not permit it to remain decentralized.	Decentralizers care less about the judiciary than they do about the other two branches and therefore do not insist on keeping it decentralized it.

PART THREE: THE BALANCE OF POWER IN THE CONSTITUENT ASSEMBLY

The Balance of Power between Centralizers and Decentralizers as Only One Among Many Balances of Power in the Constituent Assembly

During the formation of a federation, a balance of power determines the arrangement of political institutions, including the judiciary. This balance, i.e., equilibrium, exists between those desiring centralization and those preferring decentralization, with respect to all institutions implicated in the centralization/decentralization debate. In fact, a balance of power (between contending factions) shapes all of a nascent federation's institutions—even those features that have no effect on the nature of the polity's centralization. An equilibrium decides whether the federation adopts, for example, a presidential, parliamentary, or semi-presidential constitution.

The theory of a balance of power applies to diverse political phenomena ranging from international relations between nation-states to inter-branch conflict within the same country. In the contest over any institutional choice during the creation of any new

constitution, unitary or federal, the balance of power has maximal importance. That is to say, any factor matters to the selection of institutions only to the extent that it alters that balance of power.

A Balance or Imbalance of Power?

The negotiations look like an "imbalance of power" between the parties, and the factions do in fact have unequal clout in the constituent assembly. When two blocs in the constituent assembly oppose each other over some decision, one of them will secure more of what it wants than the other. One group will secure more of what it wants with respect to the judiciary, as well. But the desire to form a federation cautions the stronger side against overplaying its hand. A true imbalance would foreclose the creation of the federation entirely. If one side insisted on fulfilling all of its preferences, the other side would balk, and the negotiations would fail to create a federation. The relative strength of the centralizers and decentralizers rarely balances.

But the situation does achieve balance; one party's measure of leverage to demand certain institutions—because of that faction's greater importance to the federation—achieves equilibrium with another group's willingness to forego the federation entirely. The latter bloc wants federation but not at the cost of accepting all of the institutional features that the stronger party prefers. The institutional arrangement of the judiciary will therefore reflect the desires of one side more than the other, but the winning faction will not secure all of its preferences. The stronger side, whether in favor of decentralization or centralization, presses its advantage in the negotiations up to but not beyond the point at which the weaker side would prefer no federation at all – either the continuation of a unitary system, or the failure to associate into a federation. For this

reason, the institutional arrangement of the judiciary will reflect the desires of one side more than the other, even if only slightly.

For lack of space, the preceding account simplifies a much more complex bargaining process. It adopts agnosticism regarding the fungibility of the institutional features and prerogatives associated with the legislative, executive, and judicial branches, both within the same level and between two different levels of government. Negotiators need not, and probably cannot confine themselves to trading a judicial feature only for some other judicial feature. The constituent assembly could sufficiently mollify two opposing factions by having them exchange a judicial feature for a legislative or executive feature. They could also trade a judicial feature at the national level for a legislative or executive one at the peripheral level. One of the most obvious examples of this possibility involves the location of the institutions involved in the "legal" determinants of judicial behavior. The proponents of judicial decentralization might not have the clout to achieve attitudinal, strategic, and legal decentralization. The opponents of judicial decentralization might not have the clout to achieve attitudinal, strategic, and legal centralization. In one version of compromise, the national government writes the laws that the peripheral judges interpret. By peripheralizing the judiciary both attitudinally and strategically but not legally, each side achieves some, but not all, of its goal.

Even if the negotiations over the centralization of the federation's judiciary were to occur at both an entirely different place and time than the rest of the constituent assembly's negotiations, all of the assembly's debates would become interrelated because the same representatives do the debating. That specific equilibrium occurs where the dominant group comes closest to achieving its preferred overall institutional arrangement without alienating the weaker group. The balance emerges somewhere between the

stronger group's most preferred institutional arrangement and the institutional arrangement closest to it that the weaker group tolerates. At that location, the less powerful group's discomfort with the federation's overall institutional arrangement reaches its maximum. But that equilibrium does not maximize the concessions that the stronger faction was willing to make in order to create the federation.

Avoiding the Conceptual Conflation of Factions and Political Units

Factions that favor either decentralization or centralization do not necessarily correspond to the political units creating the federation. The influence of ideas about the proper degree of centralization can weaken or supersede the power of interests. A certain degree of centralization may best serve the interests of a political unit and yet for ideological reasons the political unit favors a different degree of centralization. While this disjunction between interests and ideological preferences affects the outcome for other institutions, it does not affect whether the judiciary is centralized or decentralized. With respect to the judicial branch, the interests inherent to preexisting institutions trump any contrary ideational preferences.

At least, they make it seem as if ideas do not matter. Ideas about centralization and decentralization are surely present, notwithstanding their seeming unimportance. The rivals may even couch their interests in terms of ideology, but, in every case the institutional arrangement of the judiciary aligns with interests (Brinks and Blass 2018; Hirschl 2013; Versteeg and Galligan 2013). This continuity of interests and ideas may occur because the factions merely mask their interests in the rhetoric of ideas or because the power of interests overwhelms the power of ideological preferences. A careful comparative study of the debates in constituent assemblies might shed light on this issue, but such a project is beyond the scope of this dissertation.

Historical examples of constituent moments show centralizers and decentralizers disagreeing over the degree of centralization for ideological rather than material reasons. Sometimes those ideologies do not match the interests of the political unit represented. Alexander Hamilton (New York) and James Madison (Virginia) favored a stronger central government while Elbridge Gerry (Massachusetts) and George Mason (Virginia) preferred a weaker central government. Their respective prescriptions reflected their political philosophies about the best form of government rather than the interests of New York, Virginia, or Massachusetts. As one of the most populous states at the time, New York would delegates should have preferred a less centralized system to prevent the smaller states from redistributing New York's resources. The most populous state, Virginia, would have also been better served by a weaker central government. With respect to the judicial institutions of the national government, these ideological divisions do not seem to have mattered, as interests overwhelmed the ideas expressed.

Certain vested interests can transcend political boundaries. The same economic group in several of the federating units may prefer centralization in order to increase their profits. Manufacturers of the same products in two adjacent states may have engaged their governments in an escalating tariff war. During the federating process both groups may nevertheless recognize the advantages of ending interstate tariffs through centralization. Other business interests may value the control that they have over their respective state governments. These groups would agree to decentralize certain policies in order to prevent competition from entrants to the markets within their own political units. Existing and potential political boundaries do not necessarily map onto preferences about institutions or material interests.

Historically, centralizers and decentralizers in constituent assemblies have voiced disagreements, putatively for ideological reasons, over the degree of centralization.

Sometimes those ideologies do not match the interests of the political unit represented. Alexander Hamilton (New York) and James Madison (Virginia) favored a stronger central government while Elbridge Gerry (Massachusetts) and George Mason (Virginia) preferred a weaker central government. Their prescriptions reflected their political philosophies about the best form of government rather than the interests of New York, Virginia, and Massachusetts. As one of the most populous states at the time, New York would have preferred a less centralized system to prevent the smaller states from redistributing New York's resources. The most populous state, Virginia, was also best served by a weaker central government. With respect to the judicial institutions of the national government, however, these ideological divisions do not seem to have mattered, as interests overwhelmed the ideas expressed.

Failed Federations and the Balance of Power

Of course, the negotiators can misjudge the preferences and commitments of their counterparts, leading to the abortion of a federal political system before its birth or a stillborn federation that disintegrates or reverts to unitarism not long after it emerges from the constituent assembly. This gives us one explanation for failed federations. Many Federations have descended into civil war. The founders of political systems often choose the institution of federalism in order to overcome ethno-linguistic, economic, or ideological cleavages, but if they fail to properly tailor federalism to those divisions, and amending the system later proves impossible, the federation may die. Some differences become or simply remain intractable, making the demise of the system inevitable. History is replete with defunct federal political systems.

PART FIVE: FROM INFLUENCES ON THE BALANCE OF POWER TO THE INFLUENCE OF EXISTING INSTITUTIONS ON THE BALANCE OF POWER

In order to give some sense of the dynamic and complicated pathways that shape the balance of power, this section has theorized some of them. But those descriptions did not go beyond theory because they did not need to. For the purposes of the arguments that follow, it does not matter whether leverage determines preferences, preferences determine leverage, or leverage and preferences are identical. The question of whether leverage determines preferences or vice versa is a vexing one. Fortunately, we need not go into it here, because, (a) we are only interested in the resulting balance of power, whatever its source, and (b), as we will see in abundant detail, the nature of the *ex-ante* institutions strongly determines the shape of the resulting institutions, swamping all other factors, including bargaining leverage.

A host of factors influence the relative clout and preferences of the centralizers and decentralizers, but in the case of the judiciary the nature of *ex ante* institutions overwhelms all of the other possible causes. Economic inequality, for instance seems to play no part in the determination of judicial institutions. We now move from the equilibrium between factions in the constituent assembly to its relationship with preexisting institutions.

Making Sense of Influences on the Balance of Power

Many factors determine the relative clout of the parties in the constituent assembly's negotiations. In some cases, those variables decide who prefers which outcome, and, in other cases, they govern just how much leverage each side has. These factors include both preexisting institutions and various structural variables such as demography, economic size, and military strength. When one side believes that it needs the federation more, it reduces that side's leverage in the negotiations. For economic,

security, or cultural reasons, that faction believes that it needs the creation of the federation more than the other faction believes that it needs the federation.

Importance of Credible Commitments and Constraints from Internal Pressure Groups

Each side of an issue up for debate in the assembly, and each political unit, faces internal constraints that circumscribe the range of negotiable institutional arrangements. Elements within a political unit may reject the form of the federation because it concedes too many of their interests. A political unit gains leverage if it can convince the other political units that it has less room to negotiate because of these internal groups (Putnam 1988). That political unit tries to signal the credibility of its commitment to satisfying those domestic stakeholders. By convincingly signaling its willingness to reject federating, a political unit increases its power in the negotiations.

Preferences and Leverage

Any analysis of plausible influences on the balance of power will inevitably face difficulties conceptualizing a distinction between leverage and preferences. Leverage and preferences need not be independent from each other. Preferences can determine leverage, and leverage can shape preferences; leverage and preferences can even become indistinguishable. The necessary takeaway from the following discussion consists in recognizing how preexisting institutions affect preferences and leverage.

From Similarities in Interests to Increased Leverage

Similarities in preferences among some of the political units can translate into collective leverage that would not exist if only one unit had those preferences. Leverage becomes a function of the relative number of negotiators in favor of a certain degree of centralization. If seven of thirteen negotiating political units favor more centralization

than the other six political units do, for example, the similarity in preferences among the seven political units generates leverage. The strength of the preferences of those seven political units on one particular issue gives them leverage, as do the presence of the cleavage and its numerical superiority.

The seven slave states' relative uniformity on the issue of slavery empowered them to protect slavery in the U.S. constitutional convention of 1787. Variation in the quantity of slaves and economic dependency on slave labor meant unequal obduracy between the slave states and the non-slave states. Material interests such as their financial investments in slaves motivated the first group, while ideology motivated the second faction. Human beings more commonly value things that they own more than ideas that they believe.

The slave states' credible commitment to preserving that "peculiar institution" for at least the short term convinced the other states against insisting upon the complete abolition of slavery as a prerequisite of federating. Their shared expectation that slavery would die a natural death also affected the balance of power between the slaveholding states and the free states. The slave states' commitment to slavery was not absolute in terms of their interests or ideology. From the slave states' imperfect long-term commitment to slavery emerged the compromises of the three-fifths clause, the explicit acceptance of the potential end of the importation of slaves, and the absence of the very word "slavery."

From Common Interests to Increased Saliency of those Interests

A previously unimportant issue can increase in saliency simply because a critical number of political units agree about it. If only one political unit elects its judges, and all of the other political units use merit selection, the debate about judicial institutions may

not even touch upon the selection of judges. Merit selection becomes a foregone conclusion. Near numerical equality, between the political units using elections and those operating with merit selection, will move judicial selection to the forefront of the debate. The group with a bare majority can attempt to achieve the entirety of its preference or it can seek ways to compromise. The minority faction could try to signal a credible commitment to its preferred system of judicial selection. It could also consider a compromise that mixes elections with merit selection.

From Surplus Leverage to Increased Saliency of an Issue

As counterintuitive as it might seem, leverage can also influence the saliency of preferences. A faction can have leverage to spare after it has secured its most important preferences about the institutions of the federation. When that group realizes that it has leftover clout, it will explore other issues over which it had not even considered its preferences. Suddenly that faction pushes for concessions from the other side on disagreements that had gone unidentified until then. The faction with surplus leverage can also trade those concessions for some other desideratum regarding the contours of the federation.

When Leverage and Preferences become Indistinguishable

From another perspective, leverage can become identical with the influence of preferences. Preferences caused by some characteristic of one party to the constituent assembly can also reduce its leverage, even though that characteristic would otherwise give that state more leverage. A militarily stronger state has greater leverage, especially because security constitutes one of the main impetuses for federating. On the other hand, because that militarily stronger state prefers the centralization of national defense, it has

less leverage. If, previous to federating, that political unit maintains a much larger military than do the other political units, that militarily superior state will prefer centralization in order to prevent the other units from free riding on its defense spending. If the militarily stronger political unit accepts a decentralized military structure for the federation, the other political units have few incentives to increase their military spending.

Those militarily weaker states can safely assume that, in the case of invasion or even domestic disturbance, the strongest political unit will defend them with its military. The militarily strongest political unit could reduce its spending in order to motivate the other political units to increase their military spending, but this strategy would also make the biggest spender vulnerable to external attacks. It will also weaken the desire of the other political units to federate with it. The United States cannot force the other members of NATO to spend more on their militaries. Outnumbered within NATO by countries spending less than required, the U.S. cannot expel a country from NATO for spending too little on defense.

The Special Case of Economic Inequality and the Balance of Power

In a country with significant economic inequality among political units, the number of political units in favor of decentralization will depend upon the nature of that economic inequality. Wealthier provinces prefer to avoid redistribution to the poorer political units, while poorer units believe that in the spirit of solidarity the wealthier regions should share their resources with the less fortunate regions. Severe economic inequality between political units will intensify that aversion to redistribution, and therefore to centralization, on the part of the wealthier political units. Such inequality will also increase the poorer regions' desire for redistribution.

For the sake of exemplifying this theory let us assume that wealthier units are equal enough in resources that none of them therefore has an interest in extracting resources from the wealthiest of the wealthy units (e.g., Brazil in 1891). If the representation of wealthier units outnumbers that of poorer units, the wealthier units will use their greater clout to achieve a less centralized federation. Minas Gerais and São Paulo, the wealthiest Brazilian states at the time, convinced the states in the next lower tier of wealth to push for decentralization. If the representation of poorer units outnumbers that of wealthier units, on the other hand, the poorer units will use their greater clout to achieve a more centralized federation (e.g., Argentina in 1860). Argentinian provinces forced the province of Buenos Aires to redistribute its tax revenues to their governments by having the central government do it for them. If the wealthier units are equal enough in resources that none of them has an interest in extracting resources from the wealthiest of the wealthy units (e.g., Brazil in 1891), they can coordinate to prevent redistribution.

How Interests Divide Centralizers and Decentralizers from Each Other

Centralizers and decentralizers can also differ because of the interests that they represent. In the early United States, slaveholders wanted greater decentralization in order to protect their "peculiar institution," while merchants sought greater centralization in order to eliminate tariffs on goods traded across state lines. The imbalance of power limits how much ideology and interests shape the form of the federation's institutions. Multiple factors determine the relative strength of the centralizers and the decentralizers. Unfortunately, we cannot directly measure this imbalance of leverage during the negotiations over the shape of the new federation.

From Influencing the Balance of Power to the Influence of Existing Institutions

In order to give some sense of the dynamic and complicated pathways that shape the balance of power, this section has theorized some of them. But those descriptions did not go beyond theory because they did not need to. For the purposes of the arguments that follow, it does not matter whether leverage determines preferences, preferences determine leverage, or leverage and preferences are identical. A host of factors influence the relative clout and preferences of the centralizers and decentralizers, but in the case of the judiciary the nature of *ex ante* institutions overwhelms all of the other possible causes. Economic inequality, for instance seems to play no part in the determination of judicial institutions. We now move from the equilibrium between factions in the constituent assembly to its relationship with preexisting institutions.

PART SIX: THE EFFECT OF PREEXISTING INSTITUTIONS ON THE INSTITUTIONS OF THE NEW FEDERATION

Political institutions that preexist a federation do not prefigure only the shape of that federation's judicial arrangement. Integrating political units with parliamentary governments, for instance, rarely adopt a presidential system for the national government. When devolving prerogatives, unitary polities with parliamentary arrangements seldom create subnational governments that separate the executive and legislative branches. Federating political units whose constitutions contain enumerated rights commonly adopt a national constitution with a Bill of Rights. New subnational governments typically adopt bicameral legislatures if the national government has both upper and lower assemblies.

This chapter builds from the observation that the existing political institutions of any country limit not only the possibility of altering them; they also constrain both the type and degree of any modification. A constitutional convention only seemingly offers

an opportunity to start the polity from scratch. Extant institutions informally, if not formally, constrain the range of choices available to the members of a constituent assembly. An institution has this ability in part because various groups have vested interests in the preservation of the institution. Those vested interests shift the balance of power between opposing groups in the constitutional convention, and the resulting equilibria determine the new state's array of institutions.

Even during a constitutional assembly, when the state apparatus explicitly exposes itself to radical transformation, a given institution can constrain the set of changes that the convention's delegates can apply to that selfsame institution. Institutions cannot change dramatically over the short term, or they will not constrain the behavior of political actors. Because they can adapt, flexible institutions endure longer than brittle ones, but infinitely malleable institutions are not institutions at all. An institution does not limit anything if it perfectly accommodates agency—if it conforms completely to the subtlest whims of a political actor.

But institutions do not have to be perfectly static in order to constrain; rather than capitulate entirely or break altogether, an institution can bend moderately, thereby preserving itself and exerting some limitations on political actors. Someone who denatures an institution by violating it will typically criticize anyone else who transgresses the institution; he wants the rule to restrain everyone but himself. At first blush the actor seemingly intends permanent change to that institution. But from a better vantage point, it becomes clear that he does not want to break or alter the institution irreparably. If the institution breaks or changes permanently, it results from the political actor's self-serving attempt to have the rule apply to everyone but him. This phenomenon encompasses a range of political behaviors, from executive orders to violations of the principle of *stare decisis*.

Moderately flexible institutions can also resist major modifications and dismantlement, even if the would-be reformers attempt their changes directly and intentionally.

Structural Cleavages and the Selection of Institutions

Institutions, nevertheless, do not have a monopoly in shaping whether the delegates choose certain institutions rather than others. In any constituent assembly, disagreements concerning economic, ideational, and other issues also divide the delegates into opposing groups. The members of a particular faction rarely agree unanimously on any of the other issues being debated in the assembly. But even if the members of two factions uniformly oppose each other over some issue, a subset of members from both groups might share some other preference. Such overlap increases a population's cohesion by intertwining a host of groups that would otherwise have nothing in common. The fewer the cross-cutting cleavages present, the greater the desire for federalism and decentralization. Certain factions inevitably influence the nascent state's institutional architecture more than the other factions.

If all of a country's cleavages match each other and coincide with its international borders, cleavages actually bring cohesion. The country does not lack cleavages altogether, but rather its cleavages simply match its political borders. Every additional cleavage that spans the entire country reinforces the others already matching that territory's boundaries. We can distinguish these "national" cleavages, all of which stretch over an entire country, from "subnational" ones that cover only part of a country's territory. The cleavages between that country and other countries eventually outweigh whatever subnational cleavages remain. These national cleavages make the members of the constituent assembly more comfortable with, if not favorable toward, centralization.

When coinciding cleavages do not match a country's international boundaries but only involve part of its territory, they reinforce each other and divide the population. The territorial boundary of a certain economic interest, for example, could match that of a particular religion. The people who live in that area identify with each other more closely because they have identical geographic, economic, and religious characteristics. Those coincident cleavages also make the differences between groups more obvious. A sense of "us" emerges more easily when contrasted with a sense of "them." Even cleavages that only parallel each other, rather than coincide, strengthen the cohesion of these populations. These subnational cleavages make the members of the constituent assembly prefer decentralization to centralization.

Making cleavages coextensive with international borders is not the only way that cleavages can increase the integrity of a country. By turning the constituent assembly into a marble cake of overlapping preferences and interests, crosscutting cleavages strengthen the acceptance of centralization in the federation. As the number of overlapping cleavages increases, it means fewer groups in opposition to each other over other institutional choices, some of which have no implications for the federation's measure of centralization.

Preexisting institutions and the attending material interests of stakeholders in those institutions can also divide the founders of the federation into opposing groups. Existing territorial boundaries may coincide with structural fault lines or overlap across them. These divisions affect the characteristics of the prospective federation's institutional framework.

Those cleavages are not inherently territorial, but, when linked to geography, they make decentralized institutions more likely. Certain institutional features, by their presence immediately before and during the birth of a federation, tilt the balance of

power between the factions represented in that federation's constitutional convention (Table 2.3). While the coincidence or overlap of cleavages make centralization or decentralization respectively more difficult, centralizers and decentralizers also consciously know what they prefer. The interrelated configurations of those cleavages aid one side more than the other in deciding the distribution of both legislative and executive policy domains, prerogatives, and powers.

How Geography Increases the Saliency of Structural Variation

The frequent coincidence of particular religious, linguistic, or other identities in the same subset of a country's population fragments a polity more thoroughly when it combines with territorial identity. The divisions in one layer consist of no more than the categories within a particular characteristic, e.g., religion, and the number of people in each of those categories. How many Hindus, Muslims, Sikhs, and Christians does India encompass? The geographic distribution of one of those groups ranges from maximal dispersal to maximal concentration. In the former situation, the group's members live intermixed with the individuals of the other religions. Hence their population density never becomes high in any part of the country. In the later circumstance, they have high population densities in one or more places but low densities throughout the rest of the territory.

Geography merely divides people according to their locations in the country, but combining locational and human diversity increase the importance of both divisions. Two people with identical religions, ethnicities, and languages live in different parts of the territory. The fact that they share every characteristic except location not only neutralizes geography's ability to increase a sense of "otherness" between them. It also reduces whatever sense of "otherness" that they experience because of their dissimilarity in

location. This constellation of different locations but identical human characteristics helps knit the country together geographically because it ties together people despite their different locations. Inverting geographic diversity and human uniformity, on the one hand, with geographic uniformity and human diversity, on the other, reveals another way in which location can unify a country.

Geography can increase the integrity of a country if people with different characteristics live in the same place. Their identical location weakens the salience of the other characteristics that divide people from each other. The significance of location grows as the number of geographically concentrated characteristics, or the number of categories within a characteristic, increases. If a population varies by just religion, only the dispersal of that one factor matters to the social integrity of the country. But with two factors the importance of location doubles. If a population contains two religions, only their relative concentrations have import. Increasing the number of religions to three means that location matters three times as much. The first scenario has only one set of relative concentrations (A and B), but the second scenario has three (A and B, A and C, B and C).

The importance of variation in human characteristics increases as the number and intensity of their geographic concentrations increase. Geographic boundaries separate people groups from each other according to one type of demographic difference, creating the fault lines unique to that layer. These boundaries need not simply split the territory into two pieces. India does not transcend the tendency typical to federations for differences in location to intensify the salience of other dissimilarities. While some regions of India have concentrations of Hindus, Muslims, Sikhs, and Christians, in many states these groups live dispersed and intermingled.

Suppose that half a country's population uniformly believes in religion A, pertains to ethnicity B, and works in industry C. The other half of the population meanwhile ascribes to religion D, belongs to ethnicity E, and toils in industry F. Let their respective geographic distributions range from maximal dispersal to maximal concentration. The chance that a country will experience secession would increase dramatically if the population of a particular region were to consist mostly of one of those two groups.

Independently segmented maps, each corresponding to the geography of one aspect of human diversity, mutually reinforce their respective divisions because their territorial dividing lines coincide. Harmony, among those lines demarcating territorial concentrations of differing structural characteristics, played a role in causing India to emerge from its founding process as a federation. But with respect to the other institutional choices facing its founders, what type of federation would India be? Fault lines geographically dividing the population according to one attribute—such as language, ethnicity, or religion—often paralleled boundaries territorially demarcating groups with respect to another one or more of those traits. The addition of a difference in "A" between two groups increases their mutual sense of "otherness" by reinforcing an existing division based on "B."

In some moments of federal creation, future subnational governments already exist in the form of separate countries that are now "coming together" as a federation. Those separate countries send representatives to a constituent assembly that is negotiating the institutional details of the future federal system. In the case of integrative federalism, the fundamental disagreement centers on how much power the integrating countries should surrender to the federation's national government.

Table 2.7 - Structural Factors and Cleavages that May Affect the Balance of Power	
Type	**Sub-Type**
Economic	Inequality *between* States (Integrative Federalism) or Geographic Regions (Devolutionary Federalism)
	Inequality *within* States (Integrative Federalism) or Geographic Regions (Devolutionary Federalism)
	Variation in Factors of Production and their Relative Proportions (Labor, Capital)
	Natural Resources
	Types of Industry
	Transportation Infrastructure (Railways, Roads, Airports)
	Communication Infrastructure (Mail, Telegraph, Phone, Cellular Phone)
	Urban/Rural Population
Human/Social/Demographic	Language
	Ethnicity
	Religion
	Culture
	Inequality in Size of Population *between* States (Integrative Federalism) or Geographic Regions (Devolutionary Federalism)
	Education/Literacy
	Size and Location of Cities
Geographic	Size
	Broken Topography (Mountains, Water)
Ideational	Different Legal Systems (Continental/Civil, Common Law, Customary, Islamic) *among* States (Integrative Federalism) or Geographic Regions (Devolutionary Federalism)

In the other version of constructing a federation, a unitary political system is "holding together" its country by establishing new sub-central political units. The national legislature creates subnational governments in order to delegate some of the central state's administrative burdens or because it hopes to forestall the secession of part of its territory. When deciding where to draw the borders between those new provinces, its legislators take cognizance of their country's structural cleavages. The national

government may already maintain administrative units in order to organize, rationalize, and strengthen its centralized control. The founders of the new federation therefore take note of the current geographic boundaries between those fiduciary departments. At the heart of its debate over decentralization, the constituent assembly must decide what prerogatives the central government should cede to the new provincial political systems.

For several reasons, the characteristics of all political institutions *ex ante* the federalizing process foreshadow the nature of the analogous institutions *ex post* the creation of the federation. In "coming together" moments, favorable use in their separate countries of the same particular institutions induces founders to establish those same features in the national government of the federation. Founders might be acquainted with options other than those with which they have the greatest experience, but their unfamiliarity places them virtually out of cognizance. Vested interests constitute another anchor on institutional change during a moment of federation. In a moment of "coming together" each state has its local merchant, manufacturing, and shipping interests that seek to maintain subnational rather than national law for the areas that affect them. Analogous vested interests in a unitary state prefer the continuation of uniformity in the laws that affect them when the federation begins. The judicial branch does not escape the phenomenon of stakeholders trying to maintain their stake in the *status quo*.

PART SEVEN - AN IRON LAW (WITH A FEW EXCEPTIONS): FEDERAL ORIGINS AND JUDICIAL ARRANGEMENTS

Among the directly measurable factors that influence a federation's degree of centralization, the nature of the institutions present at the founding plays the largest role in determining the arrangement of that federation's judiciary. Those institutions determine the relative clout of each side in the balance of power. Unfortunately, we

cannot measure this variable directly. But we can conceptualize it as the latent variable "balance of power between centralizers and decentralizers" or more generally "the balance of power." The "balance of power" varies from one institutional choice to another because the opposing coalitions in the constituent assembly vary in their composition from one institutional choice to another. Factor analysis reveals that institutions have the strongest influence upon the specific "balance of power between centralizers and decentralizers." And institutions play an even more decisive role in the particular balance of power between the centralizers and decentralizers who decide the arrangement of the federation's judiciary. These institutions specifically include 1) the distinction between "coming together" federations and "holding together" federations (created by political boundaries) and 2) the existence of decentralized judiciaries among federating political units.

Structural factors such as human demographics, geography, and economics play a role at the margins, but none of these has as much influence as the divide between these two major types of federating moments (integration vs. devolution), on the one hand, and the presence of decentralized judicial institutions, on the other. Many of these other factors correlate with the division between "coming together" and "holding together" federations and the existence of decentralized judicial institutions; this suggests that these two institutional variables my merely mediate the effects of the structural factors. Nevertheless, as we shall see soon the institutional factors are not merely a byproduct of the structural influences.

Table 2.8 – Centralized Judiciary and "Holding Together" (N=65)		
	Holding Together **N=33**	***Coming Together*** **N=32**
Centralized Judiciary **N=31**	**N=28:** Austria (1920), Belgium (1993), Bolivia (2009), Brazil (1834), Central African Republic (2004), Chile (2019), Colombia (1853), Comoros (1978), Democratic Republic of the Congo (1964; 1994; 2006), Ecuador (2008), France (1982), India (1949), Indonesia (1949), Italy (1999), Kenya (1961), Malaya Federation (1957), Nepal (2015), Pakistan (1956), Peru (2003), Philippines (1946), Russian Federation (1992), South Africa (1994), Spain (1970), St. Kitts and Nevis (1983), Sudan (1972), Uganda (1962)	**N=3:** Cameroon (1961), Canada (1867), Malaysia (1963)
Decentralized Judiciary **N=34**	**N=5:** Austria-Hungary (1867), China (1954), Czechoslovakia (1968), USSR (1923), Yugoslavia (1946)	**N=29:** Argentina (1860), Australia (1901), Bosnia-Herzegovina (1997), Brazil (1891), Central American Federation (1821), Colombia (1815), Ethiopia (1994), Ethiopia-Eritrea Federation (1952), European Union (1992), Federal Republic of Yugoslavia (1992), German Empire (1871), Iraq-Kurdistan (2003), Mali Federation (1960), Mexico (1824), Micronesia (1979), Nigeria (1960), Norway and Sweden (1815), Peru-Bolivia Confederation (1836), Poland-Lithuanian Commonwealth (1569), Rhodesia and Nyasaland (1954), Somalia (2012), South Sudan (2005), Sudan (2005), Switzerland (1848),UAE (1971), United States (1789), Venezuela (1811), West Indies Federation (1958), ZSFSR (1922)

Puzzling Exceptions to an "Iron Law"

Exceptions of "Holding Together"

"Holding together" federations such as Austria, Belgium, Bolivia, France, and Spain chose not to devolve judicial powers, but history does contain some apparent exceptions to the general rule that moments of "holding together" lead to centralized judiciaries. Brazil and Ethiopia, for example, adopted decentralized judiciaries even though they had "holding together" federalization processes. How did these cases overcome the difficulties inherent to decentralizing the judiciary within a "holding together" federation? These exceptions will require better explanation, but for now it will suffice to say that they stray significantly from the idealized type of "holding together," even if they do not strictly belong to the category of "coming together" federations either. Before any further explanation of these exceptional cases, it must be shown why moments of "coming-together" tend toward judicial decentralization. ‘

Puzzling Exceptions of "Coming Together"

In only a few cases have moments of federating involved the dismantling of decentralized judiciaries and their replacement by a unitary judiciary. The judicially decentralized Russian Federative Socialist Republic, for instance, transformed into the judicially unitary Russian Federation in 1993. Cameroon's (1963), Canada's (1867), and Malaysia's (1963) federal moments, characterized by "coming together," nevertheless gave rise to judicial centralization.

PART EIGHT: HOW THE CREATION OF SUBNATIONAL JUDICIARIES DIFFERS FROM THAT OF SUBNATIONAL EXECUTIVES AND LEGISLATURES

While variations in the balance of power most often affect the centralization of the other branches in terms of "degree," they tend to affect the centralization of judicial

institutions in terms of "kind." In other words, those variations generate a relatively dichotomous effect in judicial arrangements. It enables either the centralizers to achieve an entirely centralized judiciary or the decentralizers to create a thoroughly decentralized judiciary. The United States typifies his phenomenon, for example, because attitudinal, strategic, and legal influences over the behavior of its peripheral judiciaries belong almost entirely to peripheral governments. Spain, meanwhile, exemplifies the opposite extreme where the constitution and ordinary law give the central government complete control over the attitudinal, strategic, and most of the legal drivers of judicial behavior. The peripheral governments' only influence on judicial behavior consists in their laws, confined to the few policy domains over which they have the prerogative, interpreted by an otherwise entirely centralized judiciary.

In order to better explain what "relatively dichotomous" means here, for the time being we can simplify by lumping all areas of the law (civil, criminal, administrative, procedural, constitutional, etc.) together. All three sources of judicial behavior (attitudinal, strategic, and legal) belong, therefore, either to the central government alone or to both the central and peripheral governments. A completely centralized judiciary, in other words, exists when the national government chooses the judges, pays them, and writes the laws that they interpret. In the opposite arrangement of complete judicial decentralization, both the central and peripheral governments choose some of the judges, pay them, and write the laws that they interpret. Both the national level and the peripheral levels have their own judges, write their own laws, and have their own judges interpret those laws.

Does the Measurement Tool Cause this Difference?

Admittedly, choosing to measure centralization in this way intensifies the contrast between a tendency in the judicial branch toward dichotomous variation, on the one hand, and a tendency in the executive and legislative branches toward continuous variation, on the other. We can, of course, differentiate between judicial systems by more than the institutions that shape the attitudinal, strategic, and legal determinants of judicial behavior. Separating from each other the various areas of law, such as criminal, civil, administrative, and constitutional, for example, reveals more granular differences among the judicial arrangements that we observe in federations.

In some federations the peripheral judicial systems do indeed have jurisdiction over one or more, but not all, of these legal subjects. But far more often, if a peripheral judicial system lacks jurisdiction in one of these areas, it lacks jurisdiction in all of them because the peripheral judicial system simply does not exist attitudinally or strategically. For this reason, the universe of judiciaries in federations manifests a relatively bimodal pattern, if we measure them according to the tripartite scheme of attitudinal, strategic, and legal features. On the other hand, because federations always have at least one of them, the legislative and executive branches do not exhibit as much bimodality. To some extent, this difference occurs because of the way that this project measures the centralization of the executive and legislative branches. Unlike the tripartite way that this project measures the judiciary, most studies of legislative and executive power measure in terms of degrees rather than in terms of kind.

The measurement of judicial centralization that this dissertation uses surely sacrifices some precision to the way that it draws a bright line between centralized and decentralized systems. The measurement consists of only three aspects (attitudinal, strategic, and legal), but a case can receive the classification of centralization or

decentralization in four different ways. Whenever only one of those three aspects codes as centralized, the legal component most commonly fills that role. Brazil and Argentina manifest this arrangement. Federations with peripheral executive branches, meanwhile, never lack peripheral legislative branches. And federations with peripheral judiciaries always have peripheral legislatures and executives. The peripheral laws subject to interpretation by peripheral judiciaries may not include many topics.

Table 2.9 – Conceptualizing Centralization and Decentralization in Judicial Arrangements among Federations

	Attitudinal	Strategic	Legal
Centralized	F	F	F
	F	F	NF
	F	NF	F
	NF	F	F
Decentralized	NF	NF	NF
	NF	NF	F
	NF	F	NF
	F	NF	NF

Finally, the merely tripartite measurements mask the various institutional variations that affect the attitudinal, strategic, and legal sources of judicial behavior. Judges might strategically modify their behavior, for instance, because of constraints other than their salaries. Other institutional features, such as staff salaries, supplies, utilities, buildings, and appellate oversight of lower courts, can also influence judicial behavior. In fact, even judicial salaries manifest variation, and not just in terms of whether a country's constitution entrenches prohibitions against eliminating or reducing them. Fringe benefits, such as paid time off, health insurance, and pensions can also influence how sitting judges make strategic calculations. The list of other possible perks includes cars, chauffeurs, and housing. Salaries can increase as judges achieve promotion

to higher positions in the judicial hierarchy, lengthen their tenures, and take on additional roles such as serving on an electoral court.

Features such as these typically take the form of ordinary law rather than constitutional provisions, thereby empowering the other branches of government to use them to limit the autonomy of the judges. The salary protections constitutionally entrenched to the greatest *de jure* degree can counterintuitively weaken judicial autonomy when a political predicament renders those protections entrenched to the least *de facto* degree (Helmke and Staton 2011). A judge with life tenure at a guaranteed salary has more to lose than a judge facing a limited term, term limits, and lucrative alternatives in the private sector.

Several factors cause this uniformity of centralization or decentralization to predominate the institutions found in the judiciaries of federations. First and most significantly, the legislative branch, oftentimes in combination with the executive branch, typically has the responsibility of selecting judges, whether for a federation's national or peripheral courts. It may seem strange to think in these terms, but when some external actor has the prerogative to choose a judiciary's judges, that arrangement does limit the autonomy of that judicial system. Hypothetically speaking, judges could formally have exclusive control over all of the appointments and promotions of judges for a judicial system. And a country's constitution could entrench such an arrangement.

The universe of judicial systems does contain concrete examples that resemble that hypothetical. Informally, the Indian Supreme Court has this power and therefore that type of judicial autonomy. In many civil law systems, moreover, the higher court judges control the promotions and appointments of lower court judges. The Supreme Court of Japan, for instance, has complete and exclusive power over appointments and promotions for all of the other Japanese judges. (Ramseyer and Rasmusen 2003)

. But Japan's constitution does not prescribe a closed system in which only judges would decide the appointments and promotions of all judges. Japan's legislature appoints the judges of the Supreme Court. At the completion of a judge's first and tenth years on the Court, the Japanese electorate decides whether to remove that judge in an automatic retention referendum. The current judges of both the Superior Court of Justice (Supremo Tribunal de Justiça) and each state's Court of Justice (Tribunal de Justiça) have a part in choosing new members of those courts.

The legislative and executive branches tend to exhibit characteristics that place them along a continuum, from entirely centralized at one end to entirely decentralized at the other. They may vary in their powers, but the lower level almost always has a legislative and executive branch. When they are present, the judicial branches of the peripheral political systems can also vary along a continuum in terms of their degree of autonomy from the central government. More frequently, the judiciaries of regional governments vary starkly, from existing to not existing. With respect to their judiciaries, federations are either entirely centralized—because no peripheral judicial systems exist, or decentralized by differences of degree.

When a Federation's Constituent Assembly chooses Institutions, do Preexisting Institutions always Determine the Outcome?

The following sections that address influences on the balance of power may seem superfluous because preexisting institutions almost always determine the nature of the judiciary in federations. Why discuss alternative causal mechanisms if your observations obviate it? I include it because it enhances the presentation of the argument. We can have a better sense of the importance of preexisting institutions when we theorize the power of other factors. The true strength of a bridge cannot be known until we know how much

weight it can bear without collapsing. By considering the potential effects of structural factors, we see the causal strength of preexisting institutions. An additional reason involves non-judicial institutions in a federation. The political and judicial institutions that preexist its founding moment determine a federation's judicial institutions, but they prove far less determinative for the nature of its legislative and executive powers. They seem more susceptible to some combination of structural cleavages and preexisting institutions.

Judiciary-Specific Narratives of the Role of Preexisting Institutions in Deciding the Shape of the Judicial Institutions of a New Federation

We need to examine just why both 1) the distinction between "holding together" and "coming together" and 2) the preexistence of decentralized judicial institutions are so influential to the resulting judicial arrangement. We have established correlation, but now we need to find a narrative of causation.

A More Judiciary-Specific Explanation for the Link between "Coming Together" and Judicial Decentralization

A number of factors explain why moments of "coming together" lead to federations with decentralized judiciaries. Preexisting decentralized judiciaries are one of the major institutions that limit the ability of the centralizers in their attempt to create a monolithic judiciary. In fact, the strongest factor that predisposes the federating process toward the adoption of a decentralized judiciary is the presence of preexisting decentralized judicial institutions. As one might expect, preexisting decentralized judicial structures are more common among processes of federating that involve the "coming together" of political systems that are relatively autonomous from each other.

The causal argument is straightforward. The presence of decentralized judicial institutions means that, in order to centralize the judicial system of the eventual federation, the political leaders must dismantle the preexisting decentralized judicial systems. These preexisting judicial systems are difficult to dismantle because of the individuals invested in their continued existence.

First, the judges and staff of these courts do not want to surrender their positions, power, or prestige. Political leaders could roll these stakeholders into the new judicial system, but that would require further agreement between the negotiators of the new federation. The national government does not even need to offer them positions in the national judiciary. Moving from a state supreme court to a federal appellate court may constitute a demotion in salary, prestige, and influence. It may even require a choice between relocating in order to maintain those benefits and staying in the same place even though it means their reduction. The stakeholders may not want to be part of the new judicial system at the same time that they do not want to surrender their existing positions.

In addition to the judges and their staff, the lawyers who have accustomed themselves to the local judicial climate may not want to relinquish their local judicial system. They have developed valuable professional relationships with these judges and their staff. The lawyers know that a centralized judicial system has the potential to bring judges from another region of the federation. Those new judges are likely to change the way that the local courts interact with the local legal bar.

Local businesses also have a stake in the perpetuation of the local judiciary. Those businesses have developed expectations regarding the jurisprudence of local judges. Bankers, investors, and entrepreneurs know how their judges deal with breaches of contract, torts, and bankruptcy. They have operated accordingly. Even if a centralized

judiciary putatively makes more "pro-business" or "pro-growth" decisions, those modifications entail the short-term costs that any change involves. Uncertainty about the legal philosophy and efficiency of the courts will discourage entrepreneurs from beginning new ventures, banks from loaning capital, and investors from buying shares of corporate stocks.

All of these groups have legitimate and illegitimate modes through which they can put pressure on both the local judiciary and particular judges if they behave in ways that have adverse outcomes for these groups. If the judges do not have lifetime tenure or tenure only until a statutorily specified retirement age, lawyers and businesses can exert pressure on their elected representatives to censure, remove, or threaten these judges. Those elected representatives could also reduce or refuse to increase judicial salaries.

Locally controlled judges will mirror the power relations, societal influences, and economic relationships at the local level; federal judges, meanwhile, will tend to mirror power relations, societal influences, and economic relationships at the national level. Both powerful and weak interests at the level of the entire federation want to control the judges in their own local bailiwicks. A nationally subordinate group may have a dominant position locally. Not only the dominant interests on the national stage, but also the subordinate ones, want their immediate affairs handled by judges in ways that respond to those interests. Some nationally dominant interests may constitute a subordinate interest at the local level. At the constituent assembly, nationally powerful interests will try to negotiate the federation's adoption of at least a federal layer, if not a strong federal layer, of courts on top of the local systems of courts in order to further dominate any locally dominant interests that have only a subordinate position at the national level. The foregoing narratives constitute only some of the reasons for political

units, which come together to form a new federation, to retain their decentralized judiciaries.

A More Judiciary-Specific Explanation for the Link between "Holding Together" and Judicial Centralization

Moments of "holding together" tend toward judicial centralization for reasons analogous to but inverted with the reasons for "coming together" moments. The national judiciary also has its vested interests. Judges and legal bureaucrats typically prefer the *status quo*. The best outcome the central government can offer them consists in a choice between leaving the judiciary entirely and becoming part of the subnational judiciary. Whereas working in the national judicial system left open the opportunity to transfer to a different part of the country, the judges will find it difficult if not impossible to transfer between subnational judiciaries. The change will additionally affect their opportunities for promotion. They entered their judicial career expecting to move steadily up the national judicial hierarchy, according to some combination of seniority and merit. Depending on the national government's rules for judicial selection, becoming part of the subnational judiciary may lock judges out of job opportunities in the national judiciary. The judges have established contacts in the national government, and they do not want to start over making new contacts in a subnational government. The judges do not want to be dependent on subnational governments. They do not want new masters.

Lawyers will resist the transformation of their centralized judiciary into multiple decentralized judiciaries. Judges chosen by the center will differ jurisprudentially from those chosen by the periphery. Attorneys will become less mobile once variations in jurisprudence, judicial process, and statute emerge. Like judges, they will have to choose one state's judiciary. Changes in the law will reduce their head start over firms entering

the legal market; both the entrants and the incumbents will start with no prior knowledge of a new law. National firms might find it more sensible to break up into state-based pieces.

The uniformity of the previous legal system reduced competition because no subnational governments existed to inject variation into judicial policies. The state governments preferred this situation because they could compete with each other less for residents, investments, and businesses. Local leaders in business, civil society, and education now face the possibility that their region will not be able to retain or attract unless it actively competes.

Centrality of the Institutional Explanation

Whereas all federations have at least an executive or legislative branch at both the federal and state levels, not all federations have judiciaries at the state level. The strongest explanatory variable, for the division between federating processes that produce centralized judiciaries and those that produce decentralized judiciaries, is the distinction between federating moments of "coming together" and those of "holding together" and the concomitant presence of decentralized or centralized judicial institutions.

Near Inseparability of Type of Federalization from Nature of Judiciary

The type of federalization and the absence or presence of decentralized judicial institutions are nearly inseparable, making it difficult to determine which one of them is the more important cause, or if one of them even causes the other. At first blush, it would seem that a "coming together" moment requires the involvement of an *ex ante* decentralized judiciary. Theoretically speaking, one exception to this logic is the possibility of a colonial power controlling the judiciaries of separate colonies that would

later become a federation. The Federation of the West Indies is the only case where, up until the very moment of federalization, a colonial power controlled all of the separate judiciaries of a set of fully separated colonies that later combined into a federation. India and the Central African Federation come close, as hybrids of "coming together" and "holding together," but in each case some portion of the eventual federation had local control over the judiciary. In India it was the princely states, and in the Central African Federation it was Southern Rhodesia.

These cases notably share the experience of decolonization, which makes possible the unusual situation of the "coming together" of independent political units that lack preexisting judicial systems of their own. Only because the British Empire appointed and controlled all of the judges, in each colony that would become part of the Federation of the West Indies, did this scenario arise. The experience of the Federation of the West Indies suggests that "coming together" has greater importance than the presence of preexisting judicial institutions, or even that preexisting "coming together" can cause a federation to adopt a decentralized judiciary. But decolonization does not exhaust the list of situations that could separate the "coming together" type of federalization and the presence of decentralized judicial institutions.

Some moments of "coming together" might not involve separate judicial institutions because the pre-federation political units lack independent judicial branches altogether. Having the executive and legislative functions separated from each other does not necessarily mean the existence of a separate judiciary. In addition to performing its executive or legislative function, the executive or legislative branch could perform the judicial function. In England the executive branch once subsumed the judicial branch entirely (Shapiro 1986). In tribal communities, the same body of citizens oftentimes functions as both the legislature and the judiciary. What is more, political systems need

not separate legislative, executive, and judicial functions at all. The very word "monarchy" implies a political system where just one person ("mon") rules ("archy") all three of the branches envisioned by the modern conceptualization of government. The ruler ("archon") has the exclusive power to write, enforce, and interpret the law. These rulers include Mancur Olson's "stationary bandit" (Olson 1993), Machiavelli's "prince" (Machiavelli 1998), and St. Augustine's "robber" in Book IV of *The City of God* (Augustinus and Dyson 2007)

PART TEN: EVALUATING THE ALTERNATIVE CAUSAL MECHANISMS

Structure and Institutions: Necessary or Sufficient Causes?[10]

What kind of causes are structure and institutions, with respect to both a federation's type and the nature of its judicial institutions? First, structure or institutions could separately be capable of dictating the nature of a federation's judicial arrangement. Each of them would be a sufficient but not necessary cause. Our observations do not support that conclusion. Alternatively, according to a second mechanism, institutions or structure may constitute a cause that is simultaneously necessary and sufficient. One factor would be both necessary and sufficient, rendering the other superfluous. We will find, in fact, that preexisting institutions act in this way, serving as the necessary and sufficient cause of judicial decentralization. But we have not adequately demonstrated

---

10 Looking Deeper than the Surface of Structure and Institutions: According to a fifth type of causality, more than one arrangement of factors could be capable of causing a particular design of the judiciary. More than one, of what we can call a conjuncture or constellation of factors, could lead to one of the two outcomes. Not every road would lead to Rome, but more than one road would lead to Rome. This possibility can take one of two forms abbreviated INUS and SUIN. Evaluating either of these last two scenarios, INUS and SUIN, requires a "look under the hood." We would need both more granular characterizations and more precise measurements of both structure and institutions. Both quantitatively and qualitatively, we would need to unpack what we mean by the broad categories we are calling "institutions" and "structure."

These two causal mechanisms could involve any number of the underlying structural and institutional variables. In terms of institutions, the design of the constituent assembly might have an effect. The arrangement of committees, the apportionment of seats, and the voting rules could play a part. With respect to structural factors, the set of potentially causal economic characteristics includes more than just economic inequality. Variations, from one location to another, in the factors of production, the size of the middle class, and the quality of financial markets are but a few examples. These institutional and structural factors, then, would interact with each other in one of two ways. As it so happens, we do not need to go into that degree of detail, because one of the other causal types most closely matches our observations.

First, let us consider an INUS situation with factors A, B, C, and D. Both the combination of AB and the combinations of CD could give rise to judicial decentralization, for example. All four of these factors, A, B, C, and D constitute a cause of the INUS type. In other words, each is, and is known to be, an insufficient but necessary part of a condition which is itself unnecessary but sufficient for the result. AB or CD is sufficient for an outcome of judicial decentralization, but A or B is not individually sufficient, just as neither C nor D is individually sufficient. Neither the combination of AB nor the combination of CD, moreover, is necessary to an outcome of judicial decentralization.

In the second scenario, SUIN, a cause is a sufficient but unnecessary part of a factor that is insufficient but necessary for an outcome (SUIN). Let us say, for example, that the combination EF is both necessary and sufficient for an outcome of judicial decentralization. Each of E and F is a necessary but insufficient component of that necessary and sufficient combination EF that causes judicial decentralization. The combination EF, again, is the only way to get to judicial decentralization. But each of E and F has more than one possible cause. For the sake of clarity, let us both set aside F and use numbers instead of letters to represent any causes of E. Suppose that each of Factor 1 and Factor 2 is a sufficient and unnecessary cause of E. Factor 1 or Factor 2, in other words, can independently cause E. Factor 1 and Factor 2 are SUIN type causes.

that inference because we have not illustrated why we can eliminate all of the alternative explanations.

An alternative hypothesis to institutional continuity, for example, is that the presence of social cleavages, or of a set of decentralized institutions could lead to the decentralization of the judiciary (or of the federation more generally. We have reasons to expect that differences in the severity of fragmentation would cause variation in judicial arrangements. In both federations and unitary states, almost all instances of judicial decentralization have involved ethnic minorities. (Hayward 2015). Increases in the level of attachment to an ethnic identity correlate with an increasingly wider preference for decentralization per se, and with a preference for greater degrees of decentralization, even to the point of a preference for outright secession (Ricart-Huguet and Green 2018). Greater levels of ethnic diversity correlate with making geographically smaller political units (Alesina, Baqir, and Hoxby 2004).

Are Structure and Institutions Two Necessary Causes?

In the third scenario, structure and institutions might need each other in order to determine the nature of judicial institutions in a federation. Independent from each other, structure or institutions would be an insufficient factor in deciding the shape of the judiciary. The mere presence of structural diversity and preexisting institutions would generate a particular design for the judiciary. But this third scenario seems too facile. It does not explain why the mere presence of these two factors matters to a federation's measure of decentralization. In response to that limitation, the fourth possible mechanism must simply add a wrinkle to that third scenario. Structure and institutions could be necessary causes that require a third necessary condition. More specifically, institutions and structure may have to interact with each other in a certain way in order to cause the

observed outcome. We could conceive of this interaction as a third necessary factor or as merely the way in which they must interact.

According to that theory, when concomitantly present, structural divisions and decentralized institutions reinforce each other at the moment of federating. They function as necessary causes. The absence of either element prevents decentralization. Lipset and Rokkan (Rokkan and Lipset 1967) wrote about four cleavages in society: church vs. state, center vs. periphery, urban vs. rural, and owner vs. worker. Whereas Lipset and Rokkan emphasized the translation of social cleavages into political parties, this project focuses upon cleavages that divide the population at the moment of federation. I draw on the existing literature to identify the likely relevant cleavages.

These cleavages stem from 1) social, 2) economic, 3) historical, 4) geographic, and other structural variations. Social cleavages entail differences among groups defined by characteristics such as ethnicity, language, or religion. This explanation emphasizes structure and history, while dismissing the power relations and institutional features of constitutional conventions as epiphenomenal to these deeper causes. Examples of economic fragmentation include inequalities in aggregate or per capita income, as well as divergence in goods produced or types of employment. Historical fragmentation involves anything historical except for institutions: e.g., war, natural disasters, or some other nationally or locally shared experience. Nationally experienced episodes would constitute a force for structural integration, while locally experienced episodes would constitute a force for structural fragmentation. Historical fragmentation would include a shared experience of colonial subjugation but not the legacy of the colonial institutions left behind. Finally, geographic fragmentation comprises cleavages created by territorial size or topography.

Alone then, neither structure nor preexisting institutions would be able to determine the arrangement of the new federation's judicial institutions. But when these sources of fragmentation overlap, they reinforce each other, leading to a more decentralized federation and thus a more decentralized judiciary. When they cut across each other, they lessen the fragmentation, leading to a unitary state, in the extreme, but in less extreme cases to more centralized judiciaries. The level of decentralization of power – in particular, through the decentralization of the judiciary – will be higher in national territories with higher degrees of fragmentation, especially when there are reinforcing cleavages. In other words, in countries with deep, reinforcing cleavages that predate the national state, the federation will formally allow the peripheral judiciary to have greater power.

This hypothesis based on a specific interaction between structure and institutions predicts a direct relationship between fragmentation and the importance of the peripheral judiciary. Our set of observations makes this mechanism unlikely. Many federations with decentralized judiciaries emerged in the context of structural homogeneity, and many federations with centralized judiciaries emerged in the context of structural heterogeneity.

PART ELEVEN: VARIATION IN PROCESS NOT EPIPHENOMENAL TO STRUCTURAL FACTORS

The divide between "coming together" and "holding together," of course, masks a constellation of factors that we would expect to align with each other. Surely moments of "coming together" more frequently involve higher degrees of geographic, human, or economic fragmentation? It seems reasonable to speculate that mechanically and formally, these federalizations may be "coming together," but substantively they involve structural fragmentation that kept these political units from functioning as a unified

country in the first place. Are they moments of "coming together" rather than moments of "holding together" because of historical accident, or are they moments of "coming together" rather than "holding together" because of these underlying forces of fragmentation?

High degrees of geographic, human, and economic fragmentation do not always translate into "coming together" moments; even if they do contribute to the creation of moments of "coming together," they do not appear to matter for the establishment of decentralized judiciaries within the created federations.

Linguistic Diversity

Linguistic Fractionalization and the Variation in Process

Levels of linguistic fractionalization as measured by Fearon (Fearon and Laitin 2003) or Alesina et al. (Alesina et al. 2003) do not strongly correspond to the division between "coming together" federations and "holding together" federations. Differences in language should prevent certain countries from ever being unitary, but the use of force in history has brought diverse populations together. On the other hand, if the power of language is truly decisive, it should have united countries into unitary states long before they had the opportunity to develop into completely separate political entities. Table 2.7 illustrates how little influence linguistic fragmentation has on the type of federalization process.

Table 2.10 - Linguistic Fragmentation and Type of Federation (N=65)		
	Holding Together **N=33**	*Coming Together* **N=32**
Minimal Linguistic Fragmentation **N=24**	**N=12:** Austria (1920), Bolivia (2009), Brazil (1834), Chile (2019), Comoros (1978), Colombia (1853), Ecuador (2008), France (1982), Italy (1999), Mali Federation (1960), Peru (2003), St. Kitts and Nevis (1983)	**N=12:** Argentina (1860), Australia (1901), Brazil (1891), Central American Federation (1821), Colombia (1815), German Empire (1871), Mexico (1824), Peru-Bolivia Confederation (1836), UAE (1971), United States (1789), Venezuela (1811), West Indies Federation (1958)
Significant Linguistic Fragmentation **N=41**	**N=21:** Austria-Hungary (1867), Belgium (1993), Central African Republic (2004), Czechoslovakia (1968), Democratic Republic of the Congo (1964; 1994; 2006), India (1949), Indonesia (1949), Kenya (1961), Malaya Federation (1957), Nepal (2015), Pakistan (1956), Philippines (1946), Russian Federation (1992), South Africa (1994), Spain (1970), Sudan (1972), Uganda (1962), USSR (1923), Yugoslavia (1946)	**N=20:** Bosnia-Herzegovina (1997), Canada (1867), Cameroon (1961), Rhodesia and Nyasaland (1954), China (1954), Ethiopia (1994), Ethiopia-Eritrea Federation (1952), European Union (1992), Federal Republic of Yugoslavia (1992), Iraq-Kurdistan (2003), Malaysia (1963), Micronesia (1979), Nigeria (1960), Norway and Sweden (1815), Poland-Lithuanian Commonwealth (1569), Somalia (2012), South Sudan (2005), Sudan (2005), Switzerland (1848), ZSFSR (1922)

Linguistic Fragmentation and Judicial Decentralization

Linguistic fragmentation does not correspond strongly to judicial decentralization through federalization (Table 2.8). When we get more specific and focus upon the judicial institutions themselves, the explanatory power of language diversity is not much better. Linguistic fragmentation should drive a desire for judicial decentralization. Citizens speaking one language do not want citizens of another language choosing their judges or writing their laws. They do not want to litigate or defend themselves in a

foreign language. Language is an especially important part of the legal process. Translations often lose the true meaning of written texts and oral debate. Yet, even though these linguistically diverse populations proceed to decentralize their executive and legislative branches, they stop short of decentralizing the judicial branch.

On the other hand, in moments of "coming together" among relatively monolingual political units, the emergence of decentralization for the judiciary persists. This apparent contradiction stems primarily from the process of colonization. European powers such as Spain and Great Britain invaded the Western Hemisphere and planted monolingual settlements across vast territories. Brute force and monarchism (the Weberian legitimacy of "tradition") held them together; but wars of independence separated these linguistically uniform political units into separate countries. Hence, not only does diversity in language fail to swing the pendulum in the direction of judicial decentralization among formerly unitary states, but so too does linguistic uniformity fail to swing the pendulum in the opposite direction, toward judicial centralization.

Table 2.11 - Linguistic Fragmentation and Type of Judiciary (N=63)		
	Judicial Centralization	*Judicial Decentralization*
Little to No Linguistic Fragmentation	Austria (1920), Bolivia (2009), Brazil (1834), Chile (2019), Comoros (1978), Colombia (1853), Ecuador (2008), France (1982), Italy (1999), Mali Federation (1960), Peru (2003), St. Kitts and Nevis (1983), **N=12**	Argentina (1860), Australia (1901), Brazil (1891), Central American Federation (1821), Colombia (1815), German Empire (1871), Mexico (1824), Peru-Bolivia Confederation (1836), UAE (1971), United States (1789), Venezuela (1811), West Indies Federation (1958), **N=12**
Significant Linguistic Fragmentation	Belgium (1993), Canada (1867), Cameroon (1961), Central African Republic (2004), Democratic Republic of the Congo (1960; 2006), India (1949), Indonesia (1949), Kenya (1961), Malaya Federation (1957), Malaysia (1963), Nepal (2015), Pakistan (1956), Philippines (1946), Russian Federation (1992), South Africa (1994), Spain (1970), Sudan (1972), Uganda (1962), **N=19**	Austria-Hungary (1867), Bosnia-Herzegovina (1997), Rhodesia and Nyasaland (1954), China (1954), Czechoslovakia (1968), Ethiopia (1994), Ethiopia-Eritrea Federation (1952), European Union (1992), Federal Republic of Yugoslavia (1992), Iraq-Kurdistan (2003), Micronesia (1979), Nigeria (1960), Norway and Sweden (1815), Poland-Lithuanian Commonwealth (1569), South Sudan (2005), Sudan (2005), Switzerland (1848), USSR (1923), Yugoslavia (1946), ZSFSR (1922), **N=20**

Table 2.12 - Linguistic Fragmentation and Type of Judiciary (N=65)		
	Judicial Centralization **N=31**	*Judicial Decentralization* **N=34**
Minimal Linguistic Fragmentation **N=24**	**N=12:** Austria (1920), Bolivia (2009), Brazil (1834), Chile (2019), Comoros (1978), Colombia (1853), Ecuador (2008), France (1982), Italy (1999), Mali Federation (1960), Peru (2003), St. Kitts and Nevis (1983)	**N=12:** Argentina (1860), Australia (1901), Brazil (1891), Central American Federation (1821), Colombia (1815), German Empire (1871), Mexico (1824), Peru-Bolivia Confederation (1836), UAE (1971), United States (1789), Venezuela (1811), West Indies Federation (1958)
Significant Linguistic Fragmentation **N=41**	**N=20:** Belgium (1993), Canada (1867), Cameroon (1961), Central African Republic (2004), Democratic Republic of the Congo (1964; 1994; 2006), India (1949), Indonesia (1949), Kenya (1961), Malaya Federation (1957), Malaysia (1963), Nepal (2015), Pakistan (1956), Philippines (1946), Russian Federation (1992), South Africa (1994), Spain (1970), Sudan (1972), Uganda (1962)	**N=21:** Austria-Hungary (1867), Bosnia-Herzegovina (1997), Rhodesia and Nyasaland (1954), China (1954), Czechoslovakia (1968), Ethiopia (1994), Ethiopia-Eritrea Federation (1952), European Union (1992), Federal Republic of Yugoslavia (1992), Iraq-Kurdistan (2003), Micronesia (1979), Nigeria (1960), Norway and Sweden (1815), Poland-Lithuanian Commonwealth (1569), Somalia (2012), South Sudan (2005), Sudan (2005), Switzerland (1848), USSR (1923), Yugoslavia (1946), ZSFSR (1922)

Economic Diversity

Economic Fractionalization and the Divergence in Process

Even though it is reasonable to expect economic fractionalization to lead to moments of coming together, it is not clear that there is much of a relationship. Economic fragmentation exists when certain political units have larger economies than others.

Federations also experience economic fragmentation when some units have greater internal economic inequality. The federation can also contain economic fault lines between its subnational political units when their products or factor endowments differ.

Here, the size of cities within political units serves as a proxy for economic fragmentation. In federations with at least four political units, the presence of at least two of the three largest cities in the same political unit signifies economic concentration. Cities immediately adjacent to each other do not count as separate cities, but rather, they constitute on metropolitan area. The application of the four-unit standard will might skew the measurement for federations with only three political units. Each of the three units would have to have one of the three largest cities. For federations involving only three units, the two largest cities must be located in different political units. Finally, federations with only two political units will ipso facto have the two largest cities in the same political unit. Instead, the two largest cities must be located in different political units.

Territories with a diversity of geographically concentrated economic outputs are also prone to decentralization. The causal mechanism is relatively intuitive. Producers in one political unit do not trust that producers in another political unit understand their economic way of life or their economic interests, or at least they trust them less than they would if they were all producing the same things. Manufacturers in the cities and growers in the countryside have different economic interests.

Table 2.13 - Economic Fragmentation and Type of Federation (N=65)		
	Holding Together **N=33**	*Coming Together* **N=32**
Less Economic Fragmentation	Austria (1920), Austria-Hungary (1867), Belgium (1993), Bolivia (2009), Brazil (1834), Central African Republic (2004), Chile (2019), China (1954), Colombia (1853), Comoros (1978), Czechoslovakia (1968), Democratic Republic of the Congo (1964; 1994; 2006), Ecuador (2008), France (1982), India (1949), Indonesia (1949), Italy (1999), Kenya (1961), Malaya Federation (1957), Nepal (2015), Pakistan (1956), Peru (2003), Philippines (1946), Russian Federation (1992), South Africa (1994), Spain (1970), St. Kitts and Nevis (1983), Sudan (1972), Uganda (1962), USSR (1923), Yugoslavia (1946)	Argentina (1860), Australia (1901), Bosnia-Herzegovina (1997), Brazil (1891), Cameroon (1961), *Canada (1867)*, Central American Federation (1821), Colombia (1815), Ethiopia (1994), Ethiopia-Eritrea Federation (1952), European Union (1992), Federal Republic of Yugoslavia (1992), German Empire (1871), Iraq-Kurdistan (2003), Malaysia (1963), Mali Federation (1960), Mexico (1824), Micronesia (1979), Nigeria (1960), Norway and Sweden (1815), Peru-Bolivia Confederation (1836), Poland-Lithuanian Commonwealth (1569), Rhodesia and Nyasaland (1954), Somalia (2012), South Sudan (2005), Sudan (2005), Switzerland (1848),UAE (1971), United States (1789), Venezuela (1811), West Indies Federation (1958), ZSFSR (1922)
More Economic Fragmentation		

Table 2.14 - Economic Fragmentation and Type of Judiciary (N=65)		
	Judicial Centralization **N=31**	*Judicial Decentralization* **N=34**
Less Economic Fragmentation	Austria (1920), Belgium (1993), Bolivia (2009), Brazil (1834), Cameroon (1961), *Canada (1867)*, Central African Republic (2004), Chile (2019), Colombia (1853), Comoros (1978), Democratic Republic of the Congo (1964; 1994; 2006), Ecuador (2008), France (1982), India (1949), Indonesia (1949), Italy (1999), Kenya (1961), Malaya Federation (1957), Malaysia (1963), Nepal (2015), Pakistan (1956), Peru (2003), Philippines (1946), Russian Federation (1992), South Africa (1994), Spain (1970), St. Kitts and Nevis (1983), Sudan (1972), Uganda (1962)	Argentina (1860), Australia (1901), Austria-Hungary (1867), Bosnia-Herzegovina (1997), Brazil (1891), Central American Federation (1821), China (1954), Colombia (1815), Czechoslovakia (1968), Ethiopia (1994), Ethiopia-Eritrea Federation (1952), European Union (1992), Federal Republic of Yugoslavia (1992), German Empire (1871), Iraq-Kurdistan (2003), Mali Federation (1960), Mexico (1824), Micronesia (1979), Nigeria (1960), Norway and Sweden (1815), Peru-Bolivia Confederation (1836), Poland-Lithuanian Commonwealth (1569), Rhodesia and Nyasaland (1954), Somalia (2012), South Sudan (2005), Sudan (2005), Switzerland (1848),UAE (1971), United States (1789), USSR (1923), Venezuela (1811), West Indies Federation (1958), ZSFSR (1922), Yugoslavia (1946)
More Economic Fragmentation		

Geographic Fractionalization

While there are several seemingly intuitive mechanisms by which geographic fragmentation could influence the type of federalizing process and the relative centralization of the judiciary, the historical record suggests that the effect of geography has limitations.

The Effect of Geographic Size

Greater geographic size fractionalizes a country by creating a greater diversity of locations. Common sense suggests that larger federations will commonly involve *ex ante* moments of "coming together" and *ex post* decentralized judiciaries. Larger territories present greater governance problems because of difficulties in communication and transportation. Political elites from different political units are more likely to be distrustful of each other if they have less interaction; and they are more likely to have infrequent contact if they live far apart from each other. Moreover, if distantly located political units, particularly noncontiguous political units, are joining in federation than the odds of the federalization process being one of "coming together" increase. The larger the territory, the more likely it is that there will be distantly located political units. We want to determine whether large territorially size correlates with a decentralized judiciary.

Table 2.15 - Territorial Size and Type of Federation (N=65)		
	Holding Together **N=32**	*Coming Together* **N=33**
Smaller than Median Territorial Size **N=33**	**N=18:** Austria (1920), Austria-Hungary (1867), Belgium (1993), Central African Republic (2004), Chile (2019), Comoros (1978), Czechoslovakia (1968), Ecuador (2008), France (1982), Italy (1999), Kenya (1961), Malaya Federation (1957), Nepal (2015), Philippines (1946), Spain (1970), St. Kitts and Nevis (1983), Uganda (1962), Yugoslavia (1946)	**N=15:** Bosnia-Herzegovina (1997), Cameroon (1961), Central American Federation (1821), Federal Republic of Yugoslavia (1992), German Empire (1871), Iraq-Kurdistan (2003), Malaysia (1963), Micronesia (1979), Norway and Sweden (1815), Somalia (2012), South Sudan (2005), Switzerland (1848), UAE (1971), West Indies Federation (1958), ZSFSR (1922)
Larger than Median Territorial Size **N=32**	**N=14:** Bolivia (2009), Brazil (1834), China (1954), Colombia (1853), Democratic Republic of the Congo (1964; 1994; 2006), India (1949), Indonesia (1949), Pakistan (1956), Peru (2003), Russian Federation (1992), South Africa (1994), Sudan (1972), USSR (1923)	**N=18:** Argentina (1860), Australia (1901), Brazil (1891), *Canada (1867)*, Colombia (1815), Ethiopia (1994), Ethiopia-Eritrea Federation (1952), European Union (1992), Mali Federation (1960), Mexico (1824), Nigeria (1960), Peru-Bolivia Confederation (1836), Poland-Lithuanian Commonwealth (1569), Rhodesia and Nyasaland (1954), Sudan (2005), United States (1789), Venezuela (1811)

Table 2.16 - Territorial Size and Type of Judiciary (N=65)		
	Centralized Judiciary **N=31**	*Decentralized Judiciary* **N=34**
Smaller than Median Territorial Size **N=32**	**N=18:** Austria (1920), Austria-Hungary (1867), Belgium (1993), Cameroon (1961), Central African Republic (2004), Chile (2019), Comoros (1978), Ecuador (2008), France (1982), Italy (1999), Kenya (1961), Malaya Federation (1957), Malaysia (1963), Nepal (2015), Philippines (1946), Spain (1970), St. Kitts and Nevis (1983), Uganda (1962)	**N=14:** Bosnia-Herzegovina (1997), Central American Federation (1821), Czechoslovakia (1968), Federal Republic of Yugoslavia (1992), German Empire (1871), Iraq-Kurdistan (2003), Micronesia (1979), Norway and Sweden (1815), South Sudan (2005), Switzerland (1848), UAE (1971), West Indies Federation (1958), ZSFSR (1922), Yugoslavia (1946)
Larger than Median Territorial Size **N=33**	**N=14:** Bolivia (2009), Brazil (1834), *Canada (1867)*, Colombia (1853), Democratic Republic of the Congo (1964; 1994; 2006), India (1949), Indonesia (1949), Pakistan (1956), Peru (2003), Russian Federation (1992), South Africa (1994), Sudan (1972)	**N=18:** Argentina (1860), Australia (1901), Brazil (1891), China (1954), Colombia (1815), Ethiopia (1994), Ethiopia-Eritrea Federation (1952), European Union (1992), Mali Federation (1960), Mexico (1824), Nigeria (1960), Peru-Bolivia Confederation (1836), Poland-Lithuanian Commonwealth (1569), Rhodesia and Nyasaland (1954), Sudan (2005), United States (1789), Venezuela (1811), USSR (1923)

Broken Topography

Broken topography can also increase the likelihood of a process of "coming together" and judicial centralization in the new federation. Mountains and bodies of water are some examples of this phenomenon. Like geographic size, broken topography can make both communication and transportation more difficult.

Table 2.17 - "Broken" Topography and Type of Federation (N=63)		
	Holding Together	***Coming Together***
Little to No Topographical Fragmentation	Austria-Hungary, Central African Republic (2004), China (1954), Ethiopia (1994), India (1949), Nigeria (1960), Pakistan (1956), Russian Federation (1992), South Africa (1994), Sudan (1972), Sudan (2005)	Federation of Rhodesia and Nyasaland, Canada (1867), Ethiopia-Eritrea Federation, Norway and Sweden, Poland-Lithuanian Commonwealth, Tanzania-Zanzibar
Significant Topographical Fragmentation	Austria (1920), Belgium (1993), Bolivia (2006-2009), Cameroon (1961), Comoros (1975), France, Italy, Kenya (1961), Malaya Federation (1957), Malaysia (1963), Malaysia including Singapore, Spain, St. Kitts and Nevis	Argentina (1860), Australia Brazil, Central American Federation, Colombia (1811), Czechoslovakia (1968), German Empire (1871), Micronesia, Mexico, Switzerland, Uganda, UAE, West Indies Federation, Yugoslavia, ZSFSR

Table 2.18 - "Broken" Topography and Type of Judiciary (N=63)		
	Centralized Judiciary	***Decentralized Judiciary***
Little to No Topographical Fragmentation	Austria-Hungary, Central African Republic (2004), China (1954), Ethiopia (1994), India (1949), Nigeria (1960), Pakistan (1956), Russian Federation (1992), South Africa (1994), Sudan (1972), Sudan (2005)	Federation of Rhodesia and Nyasaland, Canada (1867), Ethiopia-Eritrea Federation, Norway and Sweden, Poland-Lithuanian Commonwealth, Tanzania-Zanzibar
Significant Topographical Fragmentation	Austria (1920), Belgium (1993), Bolivia (2006-2009), Cameroon (1961), Comoros (1975), France, Italy, Kenya (1961), Malaya Federation (1957), Malaysia (1963), Malaysia including Singapore, Spain, St. Kitts and Nevis	Argentina (1860), Australia Brazil, Central American Federation, Colombia (1811), Czechoslovakia (1968), German Empire (1871), Micronesia, Mexico, Switzerland, Uganda, UAE, West Indies Federation, Yugoslavia, ZSFSR

Conclusion: Institutions not a Mere Epiphenomenon of Structural Factors

Hence it should not be said that human, economic, and geographic fragmentation are the underlying causes of moments of "coming together," and that therefore the process of "coming together" is merely epiphenomenal to these forces of fragmentation. The only alternative explanation for the divide between federations that form "devolutionarily" and those that form "integratively" is history. The treaty of Paris combined Czech and Slovak populations within the former Austro-Hungarian Empire into the Kingdom of Czechoslovakia. It also combined the territories that comprise present day Bosnia and Herzegovina, Serbia, Montenegro, the Republic of Macedonia, and Croatia into the Kingdom of Yugoslavia. Great Britain's colonization of the constituent parts of India and Nigeria lead to their amalgamation. Franco's dictatorial rule

held Spain together. In each case, the use or threat of force created unitary states out of diverse political units.

An Alternative Institutional/Cultural Explanation: Civil Law vs. Common Law Traditions

Another potential cause of judicial centralization in federations involves the difference between the civil law and common law traditions. According to this hypothesis, when countries with legal systems that follow the civil law tradition become federations they adopt centralized judicial systems. When federating, political systems with judiciaries adhering to the common law tradition choose decentralized judicial systems. The empirical evidence does not bear out this intuition.

Table 2.19 - Civil Law Tradition and "Holding Together" N=65		
	Holding Together **N=33**	*Coming Together* **N=32**
Civil Law Tradition **N=47**	Austria (1920), Austria-Hungary (1867), Belgium (1993), Bolivia (2009), Brazil (1834), Central African Republic (2004), Chile (2019), China (1954), Colombia (1853), Comoros (1978), Czechoslovakia (1968), Democratic Republic of the Congo (1964; 1994; 2006), Ecuador (2008), France (1982), Indonesia (1949), Italy (1999), Nepal (2015), Peru (2003), Philippines (1946), Russian Federation (1992), South Africa (1994), Spain (1970), USSR (1923), Yugoslavia (1946) **N=26**	Argentina (1860), Bosnia-Herzegovina (1997), Brazil (1891), Cameroon (1961), Central American Federation (1821), Colombia (1815), Ethiopia (1994), Ethiopia-Eritrea Federation (1952), European Union (1992), Federal Republic of Yugoslavia (1992), German Empire (1871), Iraq-Kurdistan (2003), Mali Federation (1960), Mexico (1824), Norway and Sweden (1815), Peru-Bolivia Confederation (1836), Poland-Lithuanian Commonwealth (1569), Switzerland (1848), UAE (1971), Venezuela (1811), ZSFSR (1922) **N=21**
Common Law Tradition **N=17**	*India (1949)*, Kenya (1961), Malaya Federation (1957), Pakistan (1956), St. Kitts and Nevis (1983), Sudan (1972), Uganda (1962) **N=7**	Australia (1901), *Canada (1867)*, Rhodesia and Nyasaland (1954), Micronesia (1979), Nigeria (1960), Malaysia (1963), Sudan (2005), South Sudan (2005), United States (1789), West Indies Federation (1958) **N=10**
Underlined: Hybrid of Common Law and Civil Law Traditions **Italicized:** *Hybrid of Coming Together and Holding Together*		

Table 2.20 - Civil Law Tradition and Judicial Centralization N=65		
	Centralized Judiciary **N=31**	*Decentralized Judiciary* **N=34**
Civil Law Tradition **N=47**	**N=22:** Austria (1920), Belgium (1993), Bolivia (2009), Brazil (1834), Cameroon (1961), Central African Republic (2004), Chile (2019), Colombia (1853), Comoros (1975), Democratic Republic of the Congo (1964; 1994; 2006), Ecuador (2008), France (1982), Indonesia (1949), Italy (1999), Nepal (2015), Peru (2003), Philippines (1946), Russian Federation (1992), South Africa (1994), Spain (1970)	**N=25:** Argentina (1860), Austria-Hungary (1867), Brazil (1891), Bosnia-Herzegovina (1997), Central American Federation (1821), China (1954), Colombia (1811), Czechoslovakia (1968), Ethiopia (1994), Ethiopia-Eritrea Federation (1952), European Union (1992), Federal Republic of Yugoslavia (1992), German Empire (1871), Iraq-Kurdistan (2003), Mali Federation (1960), Mexico (1824), Norway and Sweden (1815), Peru-Bolivia (1836), Poland-Lithuanian Commonwealth (1569), Switzerland (1848), UAE (1971), USSR (1923), Venezuela (1811), Yugoslavia (1946), ZSFSR (1922)
Common Law Tradition **N=18**	Canada (1867), India (1949), Kenya (1961), Malaya Federation (1957), Malaysia (1963), Pakistan (1956), St. Kitts and Nevis (1983), Sudan (1972), Uganda (1962) **N=9**	Australia (1901), Rhodesia and Nyasaland (1954), Micronesia (1975), Nigeria (1960), Somalia (2012), South Sudan (2005), Sudan (2005), United States (1789), West Indies Federation (1958) **N=9**
Underlined: Hybrid of Common Law and Civil Law Traditions **Italicized:** *Hybrid of Coming Together and Holding Together*		

CONCLUSION

This chapter has presented an explanation for the variation observed in the arrangement of judicial institutions found in federations. It also offered evidence in support of that theory. The following chapter describes and defends the methodological apparatus that this dissertation uses to conceptualize and measure that evidence. After

that methodological chapter, this dissertation contains four case studies intended to buttress its theory with more detailed qualitative evidence. This chapter demonstrated considerable correlation between the variation in the dependent variable and variation in the independent variable. Those case studies, on the other hand, attempt to move the argument from one of correlation to one of causation. Finally, the conclusion will describe a number of the apparent exceptions to this dissertation's central theory and, in the process, explain how those putative exceptions in fact support the dissertation's central theory.

"That's another thing we've learned from your Nation," said Mein Herr, "map-making. But we've carried it much further than you. What do you consider the largest map that would be really useful?"

"About six inches to the mile."

"Only six inches!" exclaimed Mein Herr. "We very soon got to six yards to the mile. Then we tried a hundred yards to the mile. And then came the grandest idea of all! We actually made a map of the country, on the scale of a mile to the mile!"

"Have you used it much?" I enquired.

"It has never been spread out, yet," said Mein Herr: "the farmers objected: they said it would cover the whole country, and shut out the sunlight! So we now use the country itself, as its own map, and I assure you it does nearly as well."

—Lewis Carroll[11]

Of the Rigor in Science

In that Empire, the Art of Cartography achieved such Perfection that the map of a single Province occupied all of a City, and the map of the Empire all of a Province. With time, these Disproportionate Maps did not suffice, and the Schools of Cartographers built a Map of the Empire that was the same size as the Empire and coincided exactly with it. Less Addicted to the Study of Cartography, the Following Generations understood that that Map was Useless, and not without Impiety they gave it to the Inclemencies of the Sun and of the Winters. In the deserts of the West remain tattered Ruins of the Map, inhabited by Animals and by Beggars; in all of the Country there is no other relic of the Geographic Disciplines.

Suárez Miranda - Travels of Prudent Men, Book Four, Ch. XLV, Lérida, 1658

—B. Lynch Davis (pseudonym of Jorge Luis Borges and Adolfo Bioy Casares)[12]

[11] (L. Carroll and Furniss 1893, 169)

[12] (Borges and Bioy Casares 1946) "Del Rigor en la Ciencia: En aquel Imperio, el Arte de la Cartografía logró tal Perfección que el mapa de una sola Provincia ocupaba toda una Ciudad, y el mapa del Imperio, toda una Provincia. Con el tiempo, estos Mapas Desmesurados no satisficieron y los Colegios de Cartógrafos levantaron un Mapa del Imperio, que tenía el tamaño del Imperio y coincidía puntualmente con él. Menos Adictas al Estudio de la Cartografía, las Generaciones Siguientes entendieron que ese dilatado Mapa era Inútil y no sin Impiedad lo entregaron a las Inclemencias del Sol y los Inviernos. En los desiertos del Oeste perduran despedazadas Ruinas del Mapa, habitadas por Animales y por Mendigos; en todo el País

Chapter Three

Conceptualizing and Measuring Judicial Federalism

no hay otra reliquia de las Disciplinas Geográficas. Suárez Miranda, Viajes de Varones Prudentes, Libro Cuarto, Cap. XLV, Lérida, 1658"

INTRODUCTION

This chapter describes and defends the research design that this dissertation employs to support its argument. According to that thesis, certain institutions that preexist a federation most strongly influence, if not singlehandedly determine, the nature of that federation's judicial institutions. More specifically, those preexisting arrangements decide whether the federation's judicial system is decentralized or centralized. Part One of this chapter explains how the dissertation employs a "mixed-methods" approach; it applies the comparative method to both qualitative and quantitative data. Part One also describes how the argument buttresses its use of the comparative method by adding an examination of critical cases (Eckstein 1975; Gerring 2007). The case studies play two simultaneous roles. They serve as thick examples in standard qualitative comparisons, and they function as "critical" cases.

A "critical case" in the context of this dissertation is an observation of judicial centralization or decentralization where we least expect it (Gerring 2007). According to this dissertation's thesis, it is preexisting institutions that determine which one of those two alternative judicial arrangements a constituent assembly will choose for the federation that it is creating. In this dissertation's "critical" cases, nearly all factors—except preexisting institutions—predict the outcome that is the opposite of what the existence of those preexisting institutions predicts.

Several factors limit the number of observations: the contingencies of history, seeming randomness of human behavior, and high covariance between the federal form of government and the characteristics typical to almost all federations. Simply put, only a relatively small portion of political systems have been federations, and with respect to many traits those federations do not vary considerably. Hence no federation constitutes a

perfect "critical" case. But if any of the existing cases could defy this dissertation's thesis, the chosen cases would. We can imagine better critical cases, but they remain only hypothetical.

Part Two outlines how the dissertation applies the comparative method to the available evidence. It also identifies the countries that serve as the subjects of the deeper case studies. Part Three situates the dissertation's methodology within the social scientific application of the comparative-historical method. Part Four describes the chosen scope of observations. In order to do this, it presents its conceptualization of the phenomena that play a central role in the thesis, such as "federalism," "federal moment," and "judicial federalism." It also explains why this project's scope includes not only federal political systems formalized by a constitution but also systems formalized by law putatively less permanent than a constitution.

In large part because so many discussions of federalism confuse it with similar political phenomena, Part Five further clarifies the concept of federalism by contrasting it with other political arrangements. Readers may object to the absence of certain political arrangements that they consider federal. Part Six describes some of these "federations that almost were." A typology of subnational judicial institutions is the subject of Part Seven. Part Eight gives specificity to some other key terms such as "belong," "non-federal," and "peripheral."

Parts Nine and Ten elucidate the idea of a "federal moment." Part Nine clarifies the meaning of a "federal moment, and Part Ten delineates when a "federal moment" begins and ends. Part Ten also explains "federal moments" that involve coercion; these "putting together" moments are best understood as a subset of "coming together" moments. Part Ten also addresses how to code a country that experiences more than one

federal moment over the course of its existence. More specifically, it deals with the problem of mistakenly "double counting" an observation. Theories of "path dependence" suggest that a country that adopted a decentralized judiciary in its first federal moment is likely to adopt a decentralized judiciary in any subsequent federal moment. Part Ten explains and justifies this project's protocol for these observations. Part Eleven discusses some of the difficulties involved in coding certain federal moments. It describes this dissertation's approach to distinguishing between "holding together" and "coming together" federal moments when a case manifests ambiguity (Stepan 1999; 2001; 2004b).

PART ONE: A MIXED-METHODS APPROACH USING BOTH QUALITATIVE AND QUANTITATIVE ANALYSIS

This dissertation employs three different methodological approaches: the comparative analysis of both 1) quantitative and 2) qualitative evidence, and the qualitative examination of 3) critical cases. When it puts forward evidence to support its inferences about the political phenomenon of judicial federalism, the argument makes use of a mixed-methods design. The quantitative component of the evidence includes a data set of over sixty observations, consisting of qualitatively coded and quantitatively measured variables. It reveals a high correlation between the theorized independent variable and the dependent variable, on the one hand, and a low correlation between alternative independent variables and the dependent variable, on the other. The case studies use qualitative methodology to trace a handful of "coming together" and "holding together" moments of federal formation. The process tracing in these case studies attempts to move the argument beyond the claim of mere correlation, which the quantitative data support, to a narrative that puts forward a plausible causal mechanism.

The dissertation's methodology marshals the unique advantages of each approach and combines them synergistically (Weller and Barnes 2014). By including both of these approaches, the research design intends to avoid the explanatory shallowness inherently risked when one engages in any quantitative study, on the one hand, and the explanatory narrowness inherently risked when one engages in any qualitative study, on the other (Brady and Collier 2004; 2010; Goertz and Mahoney 2012; Keohane, King, and Verba 1994). The process of collecting the observations used in the quantitative analysis aided the selection of the case studies used in the qualitative analysis. Conversely, the more granular analysis of the case studies in the qualitative analyses improved the conceptualization and measurement used in the quantitative analysis. The medium-N size of the full universe of observations relevant to the research question makes truly large-N study impossible, and a merely small-N study would improperly forgo the additional explanatory leverage that the inclusion and examination of addition cases provide.

Critical Cases

As a third methodological tool, this dissertation employs a version of the critical case methodology {Gerring:2007vq}. The argument uses these particular case studies because they constitute some of the least likely places to find the type of variation that the dissertation's theory predicts between the dependent variable of judicial federalism and the independent variable of preexisting institutions. The structural and other non-institutional characteristics involved in these federal moments render them the least likely cases to confirm the argument about the causes of centralized/decentralized judiciaries. The dissertation engages in case studies of Brazil from both 1) 1832 to 1834 and 2) 1889

to 1891, 3) Germany from 1867 to 1871, 4) the United Provinces of Central America from 1821 to 1841, and 5) India from 1946 to 1950.

PART TWO: USING THE COMPARATIVE METHOD

This project uses the comparative method originated by John Stuart Mill (Mill 1843; 1974) and restated by Adam Przeworski and Henry Teune (Przeworski and Teune 1970)[13]. Mill's "method of difference," which Przeworski and Teune merely rename "most similar systems analysis," juxtaposes at least two cases that ideally have all but one potential causal factor in common and a different outcome on the dependent variable. The use of the term "most similar systems" emphasizes the fact that the cases are nearly identical. The use of the term "method of difference" means a focus on the two differences that do exist, one on the dependent variable side and one on the independent variable side of the causal ledger.

For the purposes of this project, rather than use two or more different countries, we use the same country at different moments in time (Brazil and India). The chapter that discusses the Central American Federation, for instance, compares it to several other Latin American countries. Those countries share many characteristics, such as the cultural legacy of the Spanish American Empire, the Spanish language, and similarities in their experiences achieving independence. But even those countries display significant variation with respect to characteristics that we want to rule out as possible causes of our dependent variable. They vary, for example, with respect to their natural resources, geography, and the size and composition of their indigenous populations.

[13] Even though they have done no more than replace Mill's terms with their own, Przeworski and Teune curiously make no mention of Mill's framework.

By examining the same country at two different moments in time, we can control for factors that even the most similar (but separate) countries would not share. Obviously, we need to keep path dependence in mind when using this type of comparison. We need to have a reasonable basis for presuming that the outcome of a certain dependent variable at time A does not affect the same dependent variable at the later time B. This is why the conceptualization and measurement of a federal moment are so important. Between the federal moment at time-A and the federal moment at time-B there must be a "reset." The theory's independent variable must return to some neutral position. With respect to federations this means a return to a unitary state or to a group of at least relatively separate political units. The dependent variable must also "reset." The unitary state must have a unitary judiciary, and the "at least relatively separate political units" must have their own individual judicial systems again.

Ideally, the independent variables—those that we want to rule out as alternative causes—do not change between time-A and time-B. If we stipulate that India's experience from 1947 to 1950 involves two federal moments (as this dissertation claims it does), India meets this condition. Little changed between India's "coming together" moment of 1947-1948 and its "holding together" moment at 1948-1950. As the chapter on India will describe, it experienced one of two scenarios. According to one account, India had a mixed federal moment that combined "coming together" (i.e., the princely states joining each other and the unitary provinces) with "holding together" (i.e., devolution in the unitary provinces). An alternative description of India's experience identifies not one but two federal moments. In the first federal moment, the princely states "came together" with the unitary provinces. In this hybrid system, the princely states experienced federalism in relation to each other and the central government.

Meanwhile, the provinces did not experience any federal autonomy. But this initial federation was short lived. Soon thereafter, the princely states lost their autonomy, and India briefly became entirely unitary. India then experienced a moment of "holding together," as the central government devolved power to both the former princely states and the provinces. For India, the alternative independent variables did not change much from time-A and time-B.

But if the independent variables do change, they cannot change in ways that ruin the comparison. For our purposes, a country cannot have high levels of structural diversity at time-A and suddenly be bereft of structural diversity at time-B, and vice versa. Brazil (from 1832 to 1834 and from 1889-1891) meets this criterion. Its structural diversity increased between 1832 and 1889 but not so much that one could say that it had low levels in in 1832 and high levels in 1889, or vice versa. Brazil changed in many ways between 1832 and 1889, but the Brazil of 1832 and the Brazil of 1889 probably had much more in common with each other than either had with other Latin American countries in 1832 or 1889. The India and Brazil of time-A, respectively, are meaningfully identical to the India and Brazil of time-B, with regard to nearly every causal variable that could be an alternative to our theory's causal variable. And, despite each set's high level of similarity at time-A and time-B, the pair in each set is distinct with respect to the causal variable that is the focus of this research: the difference between "coming together" and "holding together" processes of federal formation.

An additional set of cases can also fulfill the methodology of most similar systems/method of difference, albeit not as strongly as Brazil or India at two different moments in time. For the moment, let us suppose that India experienced only one federal moment from 1947 to 1950. Brazil (1889-1891) and India (1947-1950), therefore, were

similar systems during their respective federal moments, inasmuch that they both had high levels of diversity across a number of structural variables. Nevertheless, Brazil (1889-1891) and India (1947-1950) are dissimilar with respect to both of the key variables—"coming together" vs. "holding together" (the independent variable) and "centralized" vs. "decentralized" judiciary (the dependent variable). Austria (1920), the Central American Federation (1823-1840), and Germany (1866-1871) had lower levels of structural diversity than Brazil and India (1947-1950). But, whereas Austria (1920) experienced "holding together" and emerged judicially centralized, both the Central American Federation (1823-1840) and Germany (1866-1871) experienced "coming together" and emerged judicially decentralized.

This project also employs the method of similarity/dissimilar systems comparative method. Central America and Germany, on the one hand, were systems with low levels of disintegration in their structural variables, while Brazil (1889-1891) was a system with high levels of disintegration in their structural variables, and yet all of them shared the independent variable of "coming together" and the dependent variable of a decentralized judiciary. More generally, the medium-N set of federations fulfills the same purposes of the dissimilar systems/method of similarity comparative method. There is considerable dissimilarity among these more than sixty instances of federal formation.

PART THREE: COMPARATIVE-HISTORICAL SOCIAL SCIENCE

As a project under the umbrella of comparative-historical analysis (CHA), each of its case studies is historical insofar that it took place over fifty years ago. In fact, four of the five instances took place during the nineteenth century. Numerous political scientists have used and defended the use of observations and cases from previous time periods

(Moore 1966; Skocpol 1979). CHA is now a well-defended and widely accepted methodology within political science (Mahoney and Rueschemeyer 2003; Mahoney and Thelen 2015; Skocpol 1984), if not all social science. This dissertation's research fulfills all three of the key markers of comparative-historical scholarship:

> its focus on large-scale and often complex outcomes of enduring importance; its emphasis on empirically grounded, deep case-based research; and its attention to process and the temporal dimensions of politics. (Mahoney and Thelen 2015, 6)

First, this dissertation has a "macro-configurational orientation" in that it focuses on the large-scale political process of the formation of federations and the large-scale outcome of judicial centralization and decentralization (Mahoney and Thelen 2015, 6). It also examines the role of large structural factors. It is "configurational" in as much that it analyzes how various structural and institutional causes might be working as "causal packages" (Ragin 1987; 2014)

Second, it includes four thick examinations of particular instances that buttress the inferences that it draws from a medium-N data set. Third, the dissertation emphasizes the particular processes by which judicial federalism emerges in the special contexts of those cases. It also takes stock of the influence that the sequence of events has on outcomes.

PART FOUR: SCOPE

Delineating the scope of this research involves a discussion of three parameters: 1) the conceptualization of federalism, 2) the conceptualization of a "federal moment," and 3) the choice of a time period. Proto-federations, pseudo-federations, and drafted but unadopted federal arrangements, for instance, do not count as federations. In order to explain why, we must first define these and other key terms. Proto-federations consist in political systems that look like federations on the surface but lack the required

institutions. Proto-federations may later become federations but do not qualify at this earlier stage. Pseudo-federations claim federal status, but like proto-federations, lack the necessary institutions. The following discussion further details these definitions and clarifies other necessary distinctions.

Conceptualizing Federalism and Federation

I adopt a modified version of the definition of federation proposed by Halberstam & Reimann (Halberstam, Reimann, and Sanchez Cordero 2012) which tracks closely to William Riker's (Riker 1964):

> "a compound polity with multiple levels of government each with constitutionally grounded claims to some degree of organizational autonomy and direct legal authority over its citizens."

In my definition, the legal basis for the autonomy and legal authority need not be constitutional, but rather, it could alternatively be legislative. This definition implies that there is a non-federal level of government for at least one of the three branches, i.e., legislative, executive, or judicial. In other words, there is at least a non-federal legislature, or a non-federal executive, or a non-federal judiciary. Moreover, whether there are just one, two, or three branches with a non-federal level of government, the central government does not choose their officials. The decision here to drop the requirement of a constitutional basis is not unique to this project. This conceptualization tracks closely to that of Palermo and Kössler:

> The 'skeleton' of a federal state is represented by: a) the division of state functions between at least two different orders of government both enjoying political autonomy; b) the supremacy of the federal/national constitution; and c) a system of cooperation among the levels, including the judicial adjudication of disputes between and among the entities over the respective constitutional powers. Put differently, federally organised states find (different) ways to divide public powers among different spheres of government, combine (in different

> ways) self-rule and shared rule and (in different ways) unite without merging and divide without separating. (Palermo and Kössler 2017, 39)

In Table 3.1, I rephrase the minimalist definition in the form of six questions.

Table 3.1 – Six Criteria for the Existence of Federalism
Do the political units at the subnational level have at least one branch of government?
Do the office holders of that branch owe their office to some form of legitimating mechanism that originates from that subnational political unit?
Does that branch at the subnational level have at least one power?
Can the central government override the subnational political unit's use of that power?
Do the inhabitants of that subnational political unit have formal representation in the central government?
Does that formal representation acquire its legitimacy through a mechanism that originates from that subnational political unit?

CONSTITUTIONALIZED FEDERALISM AND ORDINARY LAW FEDERALISM

This dissertation's conceptualization of federalism—that departs from one that requires a constitutional basis for autonomous power in the peripheral governments—raises a reasonable but, nonetheless, surmountable objection. Ordinary law would seem too weak to ensure true lasting autonomy for the non-federal governments. If the central government wants to revoke the authorizing statute, it can with no more than a bare majority in the national legislature. In response to that objection, I contend that ordinary law can be just as strong if not stronger than constitutional language. There is also the weaker claim that some ordinary law can be stronger than other ordinary law. I also contend that constitutional language can fail to prevent the central government from adopting powers that heretofore had long been considered the prerogative of the peripheral governments. In other words, constitutional law may not adequately entrench federalism.

COMPARING THE ENDURANCE OF CONSTITUTIONAL PROVISIONS AND ORDINARY LAW PROVISIONS

For the purposes of this project, I employ the most minimalist or proceduralist conception of federation. And that conceptualization does not insist that non-constitutionalized federalism is in a different category than constitutionalized federalism. Constitutionalized boundaries between federal and non-federal prerogatives are not necessarily stronger than those created by ordinary or what is frequently termed "organic" law.

Spain is a prime example. Its 1978 Constitution has a clause regarding the creation of autonomy for territorial regions, but the clause is not self-executing. It authorized the Spanish Cortes to enact legislation to the give the regions autonomy, but it did not require the legislature to enact it. Therefore, the autonomy of the regions has no direct constitutionalized basis, but rather, ordinary law gives each region its autonomy. Nevertheless, it would be at least as difficult to undo these laws of autonomy in Spain, as it has been to change the constitutionalized boundaries of federalism in other countries. It was not until the government of Catalonia conducted a referendum on its independence that the central government sacked the Catalonian government. Even then, the central government did not alter the autonomy statute, and it called for new Catalonian elections.

In the U.S. context, William N. Eskridge and John Ferejohn have argued that certain ordinary statutes, which they call "super statutes," have become so entrenched in the American political system that they have achieved the level of being at least semi-amendments to the constitution itself (Eskridge and Ferejohn 2010). Whatever the merit of this argument as a normative claim, i.e., that these laws should be considered part of the Constitution, it is difficult to explain it away as an empirical observation. As examples, the authors cite both the Social Security and Medicare Acts.

The examples of Social Security and Medicare also support the contention that some constitutional language may not be as strong as other constitutional language. Before the New Deal it was commonly accepted that the national government was one of limited enumerated powers while the state governments held plenary powers, only limited by their own constitutional provisions and those of the national constitution. The states held the residual powers. In fact, when the Roosevelt administration passed the Social Security Act in 1935, many if not most legal observers expected the Supreme Court to strike it down as unconstitutional. Even FDR's Secretary of Labor, Frances Perkins doubted that Social Security was constitutional (Perkins 1972)

The Court had invalidated the Agricultural Adjustment Act in *United States v. Butler*, the Frazier-Lemke Farm Bankruptcy Act in *Louisville Joint Stock Land Bank v. Radford*, and several other laws of the New Deal. Admittedly, the language in *U.S. v. Butler* had undone the narrow "enumerated powers" understanding of the "general welfare" clause of the taxing power. *Butler* reversed the 8-1 majority in Bailey v. Drexel Furniture on that issue, but *Butler* also held that the purpose of the taxation could not be for transfer payments from one group to another. The purpose of the tax had to be general insofar that it could not be an excludable good.

The 1937 decisions in *Steward Machine Company v. Davis* and *Halvering v. Davis* upholding the constitutionality of the Social Security Act came as a surprise to most observers at the time. Bruce A. Ackerman, in the process of defending this change in constitutional jurisprudence as a version of fulfilling the Article 5 amendment process, acknowledges that those decisions coupled with the legislation that they upheld constituted a constitutional amendment (Ackerman 1998, 255-382).

In his "States Rights" address of March 2, 1930 when he was governor of New York, even FDR argued that the national government did not have the imprimatur of the Constitution to engage in social welfare policy:

> As a matter of fact and law, the governing rights of the States are all of those which have not been surrendered to the National Government by the Constitution or its amendments. Wisely or unwisely, people know that under the Eighteenth Amendment Congress has been given the right to legislate on this particular subject, but this is not the case in the matter of a great number of other vital problems of government, such as the conduct of public utilities, of banks, of insurance, of business, of agriculture, of education, of social welfare and of a dozen other important features. In these, Washington must not be encouraged to interfere. (Roosevelt 1938)

Roosevelt changed his mind about the constitutionality of social welfare after he became president, but his opinion against it was the dominant view in 1930.

How then do we distinguish between ordinary law that merely decentralizes and those that actually create a federation? Federations occur when legislation creates a truly non-national legislative, executive, or judicial branch. The selection of the members of that branch has to have autonomy from the national government or the branch is not truly peripheral. The branch must also have autonomous control of at least one policy area.

Requires the Adoption of a Constitution, Constitutional Amendment, or Ordinary Law

Moments of federal formation from either direction require the presence of a constitution, constitutional amendment, or ordinary law. Informal arrangements and institutions do not qualify as instruments for a moment of federal formation.

PART FIVE: CONCEPTUALIZATION BY DISTINCTION

There are two major sets of political institutions that we must distinguish from federations. "Top-down" political entities are unitary political systems that exhibit some

type of decentralization but do not qualify as federations. "Bottom-up" political entities are aggregations of political units that exhibit some form of integration or coordination but do not qualify as federations. Federation as a form of government exists conceptually between unitary and confederal political systems.

Unitary vs. Federal Political Systems

I exclude unitary systems from my analysis. According to Riker (Riker 1964), a political system should not be considered federal unless the peripheral governments have genuine autonomy in at least one area of public policy. The most centralized federalism will allow peripheral governments autonomy in only one small discrete way, but without that one small area the system becomes unitary. Moreover, this autonomy need not involve all three political branches. The arrangement may, for example, allow the peripheral governments to enforce the law against speeding (executive power), but the peripheral governments do not get to set the speed limit (legislative power), raise taxes to fund the enforcement (legislative power), or choose the judges who apply the law to particular infractions (judicial power). Still, without at least this tiniest prerogative to enforce the law against operating a vehicle in excess of the posted speed limit, the system would be unitary.

Federations vs. Confederations

The analysis will also exclude confederations. Following Riker, the most decentralized federalism will allow the national government to do just one thing, while reserving all other powers to the peripheral governments (Riker 1964). For example, there may be a commander in chief that leads the military (executive power), but she may be totally dependent upon the peripheral governments for funding, troops, and

declarations of war. The only truly independent prerogatives of such a commander in chief would be battlefield decisions, but that policy prerogative would make the political system federal rather than confederal.

If the central government has no truly independent prerogatives, as it did not under the United States Articles of Confederation ([1777] 1781-1789), then the union is a confederation rather than a federation. By "truly independent prerogatives" is meant that a national legislature, executive, or judiciary existed and that the existing branch could make policy independent of the states. The Articles of Confederation had a national legislature, but those legislators went to congress with instructions from their state legislatures. These instructions meant that a state's representatives in the national congress were merely fiduciaries of the will of that state legislature. They voted as a bloc, just like Länder delegates to the Bundesrat of the Federal Republic of Germany. The Confederation had no permanent Supreme Court. Disagreements between states were to be settled by an ad hoc group of Commissioners chosen by the disputant states or the national legislature, but if the committee could not settle the dispute then the entire Confederation Congress had to settle it. Executive committees existed, composed of national legislators, but even on the committees they had to obey the instructions of their states. The national congress could also override their decisions.

While the Confederation adopted a Court of Appeals in Cases of Capture, this court does not count as an apex court for the entire national judicial system (Davis 1889). It may seem as though the existence of a federal court for handling prize and capture cases would qualify as an area of policy in which the national government engages autonomously from the states, but before there can be a policy area held by the national judicial branch there must be a national apex judicial body. The executive and legislative

parts of the national government are national, but they do not qualify the Confederation as a federation because they are not autonomous from the state governments. The Court of Appeals in Cases of Capture as the only judicial part of the federal government fails to put the Confederation in the federation category for a different reason. It is autonomous from the state governments, but it is not truly national because it is not a supreme court for the entire country. Therefore, it does not fulfill the requirements of federalism with respect to the national part of judicial federalism. The Court also only heard appeals, even though it could engage in retrials in the course of considering an appeal (United States 1949). Confederations are not the only league-type aggregations of political units that might look like federations. International courts also bear a resemblance to federations.

Federation vs. Federacy

Although similar, federations and federacies differ in important ways. The term "federacy" typically refers to the subnational political unit itself that is in relationship with the central government. The United States is a federation but not a federacy. It has many dependencies, many of which are also federacies, such as Guam, Puerto Rico, and American Samoa.

In a federation, the inhabitants of the subnational political unit have formal representation in the central government, and that representation acquires its legitimacy from that local political unit. In a federacy, on the other hand, the subnational political unit does not have formal representation in the central government, or that representation does not acquire its legitimacy from that local political unit. The inhabitants of Puerto Rico, for example, have no formal representation in the central government of the United States. The island does have autonomy given to it through an ordinary statute, and it

governs almost all of its local affairs. Puerto Ricans are citizens of the United States, and they can vote in elections if they are living in one of the fifty states (congressional and presidential elections) or the District of Columbia (presidential elections only). But, when resident on the island of Puerto Rico, they have no representation in the central government. A federacy also falls short of being a federation if its formal representation does not acquire its legitimacy through a mechanism that originates from that subnational political unit.

Federalism vs. Decentralization

Federalism is not decentralization, but it typically involves decentralization (Feeley:2008, 21). In a decentralized state, the central state delegates certain responsibilities to administrative units. The central government chooses and removes the apex leadership of these administrative units, but the apex administrators may have the power to hire their staff without the permission of the central government. A central government may choose to appoint governors for its departments.

The administrators may, but typically do not, have responsibility for more than one area of policy in a geographic region. As Feeley and Rubin point out, the central state remains in charge and may choose to recentralize if it does not find the new arrangement efficient or effective (Feeley 2008, 20-21). The central government then verifies that the various local agencies have accomplished their responsibilities. The local agencies do not have the right to tell the central authority to "go take a hike," so to speak. That is to say, the local agencies cannot choose to conduct policy in way that contravenes the wishes of the central authority, at least not for long. Once the central authority finds that the local agency is defying the central agency's desires, the central agency can replace the personnel of the local branch of the central agency.

Federalism vs. Consociationalism

Federalism is also not consociationalism (Feeley 2008), although it often does contain consociational elements. At various times Belgium, Cyprus, the Netherlands, Switzerland, and South Africa have had federalism and/or consociationalism. In consociationalism, certain groups, be they ethnic, religious, or otherwise, have a designated say in the political systems. For example, the system may designate a certain political office to that group in perpetuity. The group may have control of the presidency, the military, or the vice-presidency. There may be a dual presidency or dual vice-presidency. Lebanon is consociational but not federal. The presence of consociationalism does not mean the presence of federalism because consociationalism can exist in a unitary state.

Federations vs. Courts of Human Rights

This project does not examine international courts of human rights as federations. It excludes, for example, the Inter-American Court of Human Rights, the European Court of Human Rights, and the African Court on Human and Peoples' Rights. If according to the definition of federation adopted by this project requires only one branch and policy domain for the central government, then it would appear that associations of countries that accept the jurisdiction of an international court, such as a court of human rights, would qualify as federations. A court of human rights has judges with independence from the signatory countries to the treaty that created it. The court is a branch of government, and it has the policy domain of enforcing human rights after a complainant has exhausted all domestic means of redress and appeal. Why then are they not federations? These courts do not function as apex courts with respect to criminal, civil, or administrative law.

Moreover, they only handle cases against governments rather than between citizens of the same or different countries.

The combination of an apex court of human rights with another apex court or courts to handle criminal, civil, administrative law might qualify a system as a federation, if the suits can be brought against people or private entities and not just against governments. For example, even though the signatory countries of the European Court of Human Rights and the European Union do not match perfectly, this project could consider their combination the equivalent of an apex court for the European Union. This possibility is not necessary because the European Court of Justice does handle criminal and civil cases between private parties, thereby qualifying the European Union as a federation.

PART SIX: FEDERATIONS THAT ALMOST WERE

Throughout human history, architects of political systems have proposed federal arrangements, but most of these efforts never actually came to fruition. It does not make sense to include such unfulfilled attempts at creating a federation in our set of observations. Each one's very failure implies that it did not achieve that particular negotiated equilibrium that would have made for a particular set of federal institutions. Opening the door to counting these "imaginary" federations would open the door to counting any number of merely theorized political systems that truly had no possibility of coming into being. Referring to every political arrangement that has achieved with the term "federation" or "confederation" does not make it one. Categorizing borderline cases, therefore, involves more detailed analysis.

Confederation of Equador

Some cases do not qualify. Even though the Confederation of Equador (Confederaçâo do Equador) declared its independence and created a provisional government, it never adopted a constitution. It is worth mentioning that the only draft constitution, written by Manuel Paes de Andrade, seems to have "left" each province in control of its own judicial branch, even though the preexisting arrangement was such that the central government controlled almost the entirety of the judiciary in each province (Brandão 1924; Leite 1989, 202):

> Each of one of the confederated Provinces will retain its government, tribunals, public employees of all classes in the exercise of their functions, as they are found now, except for reforms or changes, that the [Confederation] Assembly decrees. (Article 319)

Along with judicial decentralization came the need to tie the judicial system together. Article 32 explained that the Confederation Assembly had the power to create an apex court for the entire assembly, but whereas the document gave the executive and legislative branches of the Confederation government constitutional status, it did not require the Confederation government to actually create this supreme court (Leite 1989, 109).

When the royal family settled in Brazil during 1808 it established a *Relação* (the apex court for a province) in both Maranhão and Pernambuco, adding to the already existing Relações in Bahia and Rio de Janeiro. In a province without a Relação plaintiffs losing at the Crown alone had the prerogative to appoint, pay, transfer, and remove any legal official or judge from the level of the *Relações* in Recife down to the *juizes de fora* (judges from outside) in Pernambuco's counties. In fact, the province in the form of the provincial government did not have the right to appoint, pay, transfer, or remove any

judges or legal officials. The cities and counties of the province elected, paid, and removed the only non-Crown legal officials and judges. These petty elected judges or judges of the land (*juizes de terra*) included the ordinary judge (*juiz ordinário*) at the apex of the county and municipally elected judges, the small civil claims judge (*juiz vintena* also called *juiz pedâneo*), and the municipal judge-cum-sheriff (*juiz de almotaçaria* or *almotacel*) at the bottom. The national government had not yet transferred the powers of these positions to the justices of the peace (*juizes de paz*) since it had not enacted any infra-constitutional legislation for them, even though the Constitution of 1824 had empowered it to do so.

Had the Assembly adopted the draft constitution, the Confederation of Equador would have been another case in which coming together leads to a decentralized judiciary. Some scholars use the term federation to describe Ancient Greek confederations and leagues, but those systems lacked any central authority that had true autonomy from the constituent city-states. Spain's draft federal constitution of 1873 does not qualify. It never took effect because the Cortes rejected it.

PART SEVEN: USING RADIAL CATEGORIES TO CREATE A SUBNATIONAL TYPOLOGY

This project employs radial categories in its conceptualization of federalism. In this way, it attempts to avoid the mistake of removing important questions by defining them out of existence. The research design stipulates that the presence of at least one of three branches (legislative, executive judicial) at the subnational level qualifies the political system as federal. Just as it makes more sense to speak of "liberal," "popular," and "participatory" as different ways to qualify as a democracy, it makes more sense to speak of legislative, executive, and judicial as different ways to qualify as a federation. If

we assume the presence of all three branches at the national level, then the potential types of federalism are eight in number: four centralized types, and four decentralized types (Table 3.2). The letter "F" means that regional (peripheral, provincial, communal, cantonal, state, subnational) governments do not have control over this aspect of the judiciary in the regional territories. The federal (central, national) government, meanwhile, does have control over this aspect of the judiciary in the regional territories. Nevertheless, only three types have actually ever existed.

The acronym "NF" means that non-federal (regional peripheral, cantonal, state, subnational) governments do have control over this aspect of the judiciary in the regional territories. Conversely, the federal (central, national) government does not have control over this aspect of the judiciary in the regional territories. Historically speaking, the presence of the peripheral judiciary seems to require the presence of both a peripheral legislature and a peripheral executive. The presence of a peripheral executive seems to require the presence of a peripheral legislature, even in parliamentary systems without the separation of powers.

Table 3.2 - Judicial Federalism: Attitudinal, Strategic, and Legal

	Attitudinal	Strategic	Legal
Centralized	F	F	F
	F	F	NF
	F	NF	F
	NF	F	F
Decentralized	NF	NF	NF
	NF	NF	F
	NF	F	NF
	F	NF	NF

F = Regional (peripheral, provincial, communal, cantonal, state, subnational) governments DO NOT have control over this aspect of the judiciary in the regional territories. The federal (central, national) government DOES HAVE control over this aspect of the judiciary in the regional territories.

NF = Regional (peripheral, cantonal, state, subnational) governments DO HAVE control over this aspect of the judiciary in the regional territories. The federal (central, national) government DOES NOT HAVE control over this aspect of the judiciary in the regional territories.

This progression in the presence of the branches of government at the peripheral level may seem intuitive, but it is not necessary. A peripheral judiciary, for instance, does not need an executive or legislature in order to appoint judges to its courts. The current judges could choose new judges to fill vacancies, without needing the advice or consent of the peripheral executive or legislature. Alternatively, the subnational governments could lack legislative branches altogether. The system could allow for the elected governors of the peripheral governments to execute the law, in a system where the national legislature enacts all law.

Empirical examples of these possibilities exist. At the national level, The Indian Supreme Court, for instance, exercises a *de facto* prerogative to select all of India's judges, irrespective of the desires of the executive and legislative branches. Nothing prevents the same arrangement for a peripheral court system. In many judicial systems

both judicial councils and the political branches participate in the appointment of judges. In these arrangements, political branches, judges, or some combination of those two groups choose the members of judicial councils. The architects of some reform could remove the political branches' role in selecting the judicial council's members.

Sequences of Federalization and International Organization

"Holding together" at the national level and "coming together" at the international level tend to experience inverse sequences in the creation of legislative, executive, and judicial institutions.

"Holding Together" at the Country Level

At the national level, when unitary states devolve institutions to regions within them, they tend to follow a particular sequence: 1) legislature, 2) executive, and 3) judiciary. While the first institution created in a "holding together" moment is the peripheral legislature, coming together moments mean the existence of all three branches at the regional level. When Colombia adopted its 1991 Constitution, it had already devolved power to regional legislatures. The new constitution took federalization one step further by changing the method for selecting a regional governor from appointment by the president to election by a regional electorate.

"Coming Together" at the International Level without Federalization

At the international level, the creation of a judicial branch typically precedes the creation of executive and legislative branches. Multiple sovereign countries can create a common autonomous supranational institution even though they stop short of creating a complete federation together. Countries form international courts before they create other

supranational governing structures. Alec Stone Sweet notes that the judiciary tends to emerge in the relationship between two people before any executive or legislature emerges (Sweet 1999). Two individuals seek a third person to arbitrate between them regarding a particular dispute. Over time, that mechanism for resolving conflicts has a tendency to transform from being ad hoc to being institutionalized (Sweet 1999). In an anarchic system between individual countries, a similar process takes place. Examples include trade unions (e.g., NAFTA, EU), human rights courts (e.g., Inter-American Court of Human Rights, European Court of Human Rights), and international courts (e.g., International Court of Justice, International Criminal Court).

The creation of an executive branch, moreover, tends to precede that of a legislative branch. Sovereign countries are willing to accept an autonomous executive who can act quickly, energetically, and efficiently in the international sphere. These executive actions do not tend to have the same degree of universal effect as laws. The creation of a supranational autonomous legislature explicitly entails the creation of laws with universal applicability. In contrast to undoing previous executive actions, revoking or modifying existing laws generally requires the enactment of a new law.

Interestingly, the founders of international institutions tend to create the judicial, executive, and legislative branches in this sequence, even though they know full well that both the judiciaries and executives can make law. In many national political systems, those branches function in effect as lawmakers. Some international systems formalize the law making of the executive and judicial branches. Independent of the member states, the European Parliament, and the European Council, the EU's bureaucracy can create new regulations to fill the interstices left by inadequate specificity in any formal EU law (Article 290 TFEU). By means of an "implementing act," the Council and the Parliament

can agree formally to confer lawmaking powers to the Commission, i.e., the EU's executive branch (Article 291 TFEU). Informally, the administrative agencies of the EU have progressively accreted additional lawmaking power, notwithstanding the Meroni Doctrine that circumscribes such delegation (Simoncini 2018). The European Court of Justice (ECJ) issues decisions that in effect act as binding precedents for any meaningfully similar cases that it considers. What is more, those decisions bind the national courts of the member states to make similar decisions when faced with similar cases in the future. In countries following the common law tradition, courts generate precedents. The agencies of the administrative state issue regulations and rules, which function as laws no less than do legislative enactments.

This conceptualization of federalism emphasizes the importance of the presence of a branch at the federal or peripheral levels rather than the scope of powers that a peripheral branch has. It is generally true that a peripheral legislative branch with many policy domains is more powerful than a similar legislature with only one policy domain, unless that one policy domain is more significant in some way than the combined importance of the first legislature's policy domains. The same can be said for both peripheral judiciaries and executives. Obviously, the importance of policy domains can be incommensurate.

Slightly less clear is whether a peripheral executive with two policy domains is more powerful than a peripheral legislature with one policy domain unrelated to the two policy domains of the peripheral executive. The presence of one policy domain for a peripheral branch presupposes the existence of that branch, but the presence of a branch does not necessarily mean the presence of a policy domain. A peripheral legislature could be merely advisory or have no way to override a veto by the central government. It

follows that the presence of a peripheral branch without a policy domain is more likely to get a policy domain than is a non-existent peripheral branch. Likewise, a peripheral branch with a policy domain is more likely to receive an additional policy domain than a peripheral branch without any policy domains.

From the "bottom up" we can identify the few permutations that actually exist. In these cases the peripheral governments have the full complement of the legislative, executive, and judicial branches, but the central government does not have all three branches.

Table 3.3 - Variations of Federalism						
Central Legislative	**Central Executive**	**Central Judiciary**	**Peripheral Legislature**	**Peripheral Executive**	**Peripheral Judiciary**	**Examples (if any exist)**
Y	Y	Y	Y	Y	Y	United States (1789-present)
Y	Y	Y	Y	N	N	Brazil (1834-1889)
Y	Y	Y	Y	Y	N	Canada
Y	Y	Y		Y	Y	UAE
Y	Y	Y	Y		Y	none
Y	Y	Y		Y		none
Y	Y	Y			Y	none

PART EIGHT: ADDITIONAL TERMINOLOGY

For the sake of conceptual clarity it is also necessary to explain what this project means when it uses certain terms.

"Peripheral" vs. "Subnational"

The very word "federal" presents difficulties. Prior to the 1787 U.S. Constitution, theorists used the terms confederal and federal interchangeably. The terms traditionally emphasized the fact that the majority of the power remained with the component political units. During the debates in the Federal Convention, delegates espoused their commitment to "federal" government to mean both a commitment to maintaining the sovereignty of the several states and a commitment to having a strong central government. After the convention, the Federalist Party tried to make the term exclusively mean a strong central government, even though Jefferson and Madison continued to use the term to mean the opposite.

When we speak of federalism we mean a system that has both a national government and governments that are 1) autonomous from the national government and 2) collectively span most of the same territory. A country remains a federation even if some of its land—such as Australia's Northern Territory, U.S. Indian reservations and unincorporated territories such as Puerto Rico, and Brazil's national parks—belong to the federal government. Scholars of federalism have many options to denote the governments that this project studies. Those political units have different names in different countries such as province, state, Länder, and canton. It would sound strange to call any of these political units according to the terminology of another political system. We cannot call the states in the U.S. cantons, nor can we call the German Länder provinces. Some

unitary political systems, moreover, use these terms, such as province, to denote administrative units dependent on the central government.

Those with a research agenda focused on the United States might contend that the term "state" is most appropriate, but that term is already equivocal, even for studies of the United States. We can speak of "the state" as a political institution, e.g., the elected government, the unelected bureaucracy, and the judicial branch. But "state" can also refer to a country, such as the state of Israel, and it can mean the political units within a federation, such as the "states" within the United States. Unfortunately, there exists no generic term for the political units within a federation. When studying these political units in the context of one country there is no need for an additional term, but in the study of comparative political systems we want to move from the concrete to the abstract.

The following discussion explains why, in the face of several apparently excellent alternatives such as subnational, non-federal, and regional, this project chooses to use "peripheral" and "central." "Subnational" is an obvious alternative, it being the opposite of national. But "subnational" can refer to any political institution not national in scope or power. Federal Circuit Courts in the U.S. belong to the national government, but their effects reach only so far as the geographic territory under their jurisdiction. With the exception of injunctions with nationwide effect, decisions by the Sixth Circuit Court of Appeals apply to Kentucky, Michigan, Ohio, and Tennessee, but not to California.

I use the term "peripheral" rather than "subnational" to denote parts of the government that do not belong to the central government but are also not counties, cities, villages, or towns. "Subnational" is the larger category. Counties, cities, municipalities, villages, and towns are subnational but so are peripheral governments. I use the term "subnational" not only to denote states, provinces, regions, Länder, cantons and other non-federal political units; I also use it to refer to units that are federal but do not have

jurisdiction over the entire country. The term "non-federal" would simply be a privative and would also fail to exclude cities, towns, and counties. The distinction matters to all three branches of government. Administrative divisions, such as departments with centrally appointed governors, are subnational but not non-federal. Decisions by the subnational U.S. Court of Appeals for the Fifth Circuit are only binding upon the states of Texas, Louisiana, and Mississippi. Meanwhile, the Texas Supreme Court is both subnational and peripheral.

The term "peripheral" has the benefit of being the opposite of "central." Unfortunately, one of the most immediate meanings of "peripheral" has to do with physical distance from the center, while the subnational units we are interested in could be at the very center in terms of geography. "Peripheral" can also mean unimportant, tangential, or marginal. The government of one political unit in a federation could be "peripheral"—in the sense of not being the "central" government—but that does not necessarily make that government peripheral in the sense of being unimportant to the country. The states of São Paulo, Rio de Janeiro, and Minas Gerais, for instance, were peripheral to the Brazil's First Republic in the first sense but not in the second sense.

One political unit within a federation, moreover, could be less important than another in ways such as the size of its population, land, or economy. California, for instance, is more important than Rhode Island to the U.S. economy. Brazil's Second Republic occurred at least in part because Rio Grande do Sul grew from being less important than São Paulo, Rio de Janeiro, and Minas Gerais to being their equal. Hence the use of the term "peripheral" here does not imply unimportance or lesser importance, and "central" does not imply maximal importance or greater importance.

"Belong" and "Non-Federal Courts"

This proposal focuses on the creation or not of courts that are non-federal in at least one of three ways: legally, attitudinally, or strategically. Explanations of judicial behavior fall into three rival groups. Scholars from Dworkin (Dworkin 1978) to Bailey & Maltzman (Bailey 2011) contend that statutory language and precedent constrain the latitude with which judges issue decisions. According to this "legal model," a proper explanation of judicial behavior will assess the written language of statutes and precedents. Academics such as Segal & Spaeth (Spaeth 1993; 2002) emphasize how the ideologies of judges decide cases. This "attitudinal model" contends that the process for selecting judges, especially who nominates and appoints, matters a great deal to how judges rule in the cases that come before them. Finally, advocates of the "strategic model" such as Knight & Epstein (Epstein 1998) and Clark (Clark 2011) argue that judges make a cost-benefit analysis in their decisions, weighing the benefit of expressing their preferences against the cost that doing so will entail for other things that they value such as their careers, remuneration, or relationships with other judges, the public, and the elected branches of government.

Peripheral in the legal sense are those that spend most of their time interpreting state statutes, precedents, and constitutions. For instance, U.S. state courts, even though they have the authority to interpret federal law and the federal constitution, spend most of their time interpreting state statutes, state common law, and state constitutions. Federal courts in the legal sense are those that spend most of their time interpreting laws enacted by the national legislature and executive. For example, the highest cantonal courts in Switzerland and the highest state courts in Brazil spend most of their time interpreting federal codes of civil and criminal law.

Peripheral courts in the attitudinal sense are those for which 1) the peripheral executive or legislative branches choose at least some of the judges who sit on the courts, 2) local career processes determine who the judges will be, and judicial career transfers from one non-federal system to another non-federal system are rare if not non-existent, or at the very least 3) the central government does not choose the judges. Even though the appointments process for state judges varies considerably in the United States (e.g., gubernatorial appointment with legislative approval, "merit" system, or elections), all state judges are attitudinally non-federal. In contrast, even though the Canadian constitution calls certain courts "provincial" because the provinces have the prerogative to establish those courts and pay the salaries of their respective judges, those courts do not belong to the provinces because the central government appoints their judges. Therefore, these "provincial" judges are federal in the attitudinal sense.

Finally, courts are non-federal in the strategic sense if they receive their salaries, resources, staff, or facilities from a non-federal government, e.g., the Canadian "provincial" courts mentioned previously. They are strategically non-federal because non-federal actors control a significant proportion of their incentive structure. Courts are federal in the strategic sense if they receive these things from the central government.

"Judicial Federalism"

A federation has judicial federalism if the courts that belong to the non-federal units have jurisdiction over entire non-federal units. That definition may seem straightforward, but it involves several requirements that differ from those of the best students of federalism. For example, Falleti and Cameron (Falleti and Cameron 2005) argue for a conceptualization of "full federalism" that requires the existence of non-federal courts and the "subnational separation of powers," but their list of cases

characterizes as federations several systems that do not have non-federal judiciaries in the sense that this project employs (Falleti and Cameron 2005, 259). For example, they indicate that Canada and Venezuela have judicial federalism. Canada's provinces appoint judges to small claims and petty crimes courts, but none of these courts has jurisdiction over an entire province. The central government appoints the judges of the Superior and Provincial courts that have jurisdiction over entire Canadian provinces. Venezuela's "state" courts have jurisdiction over entire states, but they are state courts in name only. The central government appoints their judges and pays their salaries.

India is another example where first appearances can be deceiving. India also has non-federal courts only for lower level courts. The central government chooses the judges for all of the High Courts in the country. Even though state governors choose district court judges, district courts have limited jurisdiction rather than general jurisdiction, and they function under the direct supervision of High Courts. The High Courts cover entire states in India, and their decisions have precedential force over the decision-making of the district courts. Meanwhile, the district courts only have jurisdiction over much smaller territorial jurisdictions. In addition, the High Courts play a constitutionally mandated consultative role in the selection of judges to the district courts. In short, India's regional courts function as part of the central government.

PART NINE: CONCEPTUALIZATION OF A "FEDERAL MOMENT"

A "federal moment" or a "moment of federating" consists in a finite historical situation in which a federation forms. Within the broader literature on federalism, scholars have observed that the type of federation is a result of the mechanism of federating. According to Alfred C. Stepan (1999; 2001; 2004), a federation occurs in roughly one of two ways: "holding together" or "coming together." This distinction has a

long pedigree. The earliest instance was likely William C. Morey who called them "aggregation" and "disaggregation with decentralization" (Morey 1895). Victor Knapp calls them "synthetic" and "analytic" (Knapp 1984). Koen Lenaerts identifies a distinction between "integrative" and "devolutionary" federalism (Lenaerts 1990). Daniel M. Weinstock calls them "federal integration" and "federal restructuring" (Weinstock 2001). Even though all of these terms refer to the same two phenomena, the dissertation will generally—i.e., apart from this chapter on methodology--use "coming together" and "holding together." But the reader should know that other authors that this project quotes, especially in the case study chapters, use their own terms when referring to these two types of federations.

Table 3.4 – Variations in Terminologies for the Two Main Types of Federal Formation and Federations

Type A	Type B	Author	Year
Coming Together	Holding Together	Stepan	2004, 2001, 1999
Federal Integration	Federal Restructuring	Weinstock	2001
Integrative Federalism	Devolutionary Federalism	Lenaerts	1990
Synthetic	Analytic	Knapp	1984
Aggregation	Disaggregation with Decentralization	Morey	1895
Sources: (Stepan 1999, 2001, 2004; Weinstock 2001; Lenaerts 1990; Morey 1895; Knapp:1984)			

Table 3.5 – How Different Scholars Define the Two Major Paths to the Creation of a Federation

Term for Type A	Definition of Type A	Examples Given of Type A	Term for Type B	Definition of Type B	Examples Given of Type B	Author	Year
"Coming Together"	"largely voluntary bargain, are the relatively autonomous units that 'come together' to pool their sovereignty while retaining their individual identities"	United States, Australia, Switzerland	"Holding Together"	"political systems with strong unitary features" "political leaders in these…multicultural polities came to the decision that the best way—indeed, the only way—to hold their countries together in a democracy would be to devolve power constitutionally and turn their threatened polities into federations"	Spain, Belgium, India	Stepan	2004, 2001, 1999

Table 3.5, continued.

Term for Type A	Definition of Type A	Examples Given of Type A	Term for Type B	Definition of Type B	Examples Given of Type B	Author	Year
"Federal Integration"	"agreement by two or more independent political entities to acquire common political structures"	United States, Canada, European Union	"Federal "Restructuring	" 'federalization' of a unitary state"; "Sometimes, the federalisation of a unitary state will be based on territorial, cultural, linguistic, or other divisions that the unitary state had been intended to eliminate, but one may also conceive of federal systems of which the components are not based on any previous political or cultural division"	Spain	Weinstock	2001

Table 3.5, continued.

Term for Type A	Definition of Type A	Examples Given of Type A	Term for Type B	Definition of Type B	Examples Given of Type B	Author	Year
"Integrative Federalism"	"constitutional order that strives at unity in diversity among previously independent or con-federally related component entities"	European Union, Switzerland, United States	"Devolutionary Federalism"	"a constitutional order that redistributes the powers of a previously unitary State among its component entities; these entities obtain an autonomous status within their fields of responsibility"	Belgium, Canada, Spain	Lenaerts	1990

Table 3.5, continued.

Term for Type A	Definition of Type A	Examples Given of Type A	Term for Type B	Definition of Type B	Examples Given of Type B	Author	Year
Synthetic	Certain relatively weak state or territorial units joined to form a stronger community, which was later joined by further states or territorial units to form, together with the historical kernel, the contemporary entirety. The original multiplicity of power gave way to unity of power."	Switzerland, United States,	Analytic			Knapp	1984

Table 3.5, continued.

Term for Type A	Definition of Type A	Examples Given of Type A	Term for Type B	Definition of Type B	Examples Given of Type B	Author	Year
Aggregation			Disaggregation with Decentralization			Morey	1895

Sources: (Knapp 1984; Lenaerts 1990; Morey 2016; Stepan 1999; 2004b; Weinstock 2001)

Some moments of federating ("integrative" or "coming together" federalism) involve the combination of multiple political units (e.g., United States) in the Rikerian way (Riker1964). In these scenarios, the process stops short of creating a unitary political system. The separate political units, that combine into the federation, give some but not all of their policy prerogatives to a newly created central government.

Other moments of federating ("devolutionary" or "holding together" federalism) involve one political system (e.g., Spain) devolving power from the center to multiple newly created political units that cover only part of the country's territory. In this second class of moments of federating, the act of federating is often intended to prevent a unitary state from becoming several separate countries (Stepan 2001). Other times, the central government initiates federalism for the sake of convenience and efficiency or with the banners of good governance and accountability. The conceptualization of "holding together" does not depend in any way on the putative or true reasons for the creation of the federation. Moreover, "holding together" federal formation stops short of creating a confederation.

Table 3.6 - Types of Federalism and Judicial Systems

	Coming Together	**Holding Together**
Decentralized Judiciary	Argentina, United States, Australia,	
Centralized Judiciary	Canada	Austria, Spain, Belgium

PART TEN: PINPOINTING THE BEGINNING OF THE FEDERALIZATION PROCESS

Before proceeding, it is necessary to make a conceptual clarification as to the beginning and end of a process of federalization. We want to avoid removing interesting questions by answering them inadvertently through conceptual fiat. In some cases,

deciding when the process begins is crucial to determining whether the process is one of "coming together" or " holding together." For example, if we only examine the formal constituent assembly that approved the Indian constitution, then the Indian case clearly looks like an instance of "holding together." Stepan, for one, draws this conclusion because all of the negotiations with the princely states were complete by the time the constitutional assembly convened. With its centralized judiciary, it conforms to the expectation that moments of "holding together" lead to centralized judiciaries.

Alternatively, if we date the beginning of the Indian process further back to the time when the British government made it clear that India would become an independent country, then the process looks like an instance of "coming together." The Indian government attempted but failed to hold the provinces that would become Pakistan within the fold. Likewise, the Indian government had to negotiate with the princely states to convince them to remain part of greater India. If we date the beginning of the federalizing process to the years before Indian independence, then the Indian case violates the expectation that moments of "coming together" lead to centralized judiciaries.

This project adopts modes of conceptualization and measurement that attempt to include the full course of the federalizing process. The process begins when the old ex ante political system ends or when the people of the political units have enough information to know that it is going to end. Hence, the Spanish American cases of Argentina, Colombia, Mexico, and Venezuela begin with the declarations of independence and the ensuing wars. On the other hand, the Indian process begins when the British formalize their process for decolonizing the Indian subcontinent that included not only what would become present day India but also present day Pakistan and Bangladesh. Federalizing processes need not be purely of the "coming together" or "holding together" types, but rather, they can pass through periods more dominated by

one type than the other. For instance, in the Indian case, the period during which the central government negotiated the inclusion of the princely states, and the period when the Muslim League still participated in the beginnings of the constituent assembly most closely reflect the "coming together" type. On the other hand, once the partition began and the negotiations with the princely states were completed, the "holding together" phase took place. Nevertheless, one type dominates. In the case of India, the "holding together" plays a larger role than "coming together."

Pinpointing the End of the Federalization Process

Dating the end of the federalizing process is generally less difficult but nevertheless sometimes confusing. For example, the end of the Indian process, the adoption of the 1950 constitution, would be the same whether we date the beginning before the exit of the British or at the elections for the constituent assembly in 1946. Nearly all of present-day India, hold Jammu and Kashmir, was part of India in 1950. Even though India has amended its constitution numerous times, and even though it has divided some of the original states into smaller states, India's process was truly over in 1950.

Other instances are more ambiguous. Argentina, for instance is a more complicated case with respect to the end of the process of federating. While all but one of the Argentine provinces adopted the confederal constitution in 1854, the province of Buenos Aires remained separate until 1860, and only after a subsequent battle was it clear that national integration was complete. Buenos Aires was both the most prosperous and most populated province at the time; saying that it was simply an addendum to the existing federation misrepresents its significance.

Pinpointing the end of the federalization process is also important to determining the size of the set of cases. The Colombian and Venezuelan Constitutions of 1811, for instance, did not last long since the Spanish armies reconquered those territories in 1816 and 1812 respectively. Nueva Granada (Colombia) in 1819 and Venezuela in 1817 ultimately reachieved independence. In neither case did political leaders adopt a new constitution until that of the centralist Gran Colombia in 1821. Granted, a formal compact, adopted in 1819, did outline what would become this new constitution. Hence, both Colombia and Venezuela, throughout the war for independence, retained their 1811 constitutions, even if those constitutions were not in full force because of the chaos. In fact, when Venezuela declared the second (1813) and third (1817) republics it did not adopt a new constitution, but rather, it reinstituted that of 1811. In this case, the ending is relatively straightforward, even if we might quibble about when the federations actually ended. Each constitution of 1811 did not change after 1811, so the federalization process both began and ended in 1811.

Other cases involve multiple stages and therefore the most appropriate way to characterize the process is as one process rather than as several. The North German Confederation preceded the German Empire (1871). The construction of the North German Federation so influenced the structure of the German Empire, that it would be incorrect to count them as two separate cases. It would be unusual for an existing federation to merge with additional territories and generate a unitary state. The constituent political units of the preexisting federation do not have any incentive to capitulate their power to the center. Institutions are sticky.

A federation ends when it becomes a unitary state. If a federation ends, then that country can experience more than one moment of federalization. Moreover, the types of federalization can vary. Colombia, for example, experienced “coming together”

federalization in 1811 but "holding together" federalization in 1991. Once a country becomes a federation it would be wrong to count an immediately subsequent federation as a brand new moment of federalization. Hence, while it would be right to call Venezuela's 1811 and 1989 moments separate, the 1999 constitution is not a separate moment because Venezuela was already federal at that point. Counting the 1999 constitution would be akin to double counting. This deepening of federalism in the 1999 constitution does not constitute the end of a process begun in 1989, but rather, the federalization process began and ended in 1989. The terminus of a federation can take one of three forms: there must be 1) a moment of centralized government (Colombia in 1886), or 2) a moment when the country gains full self rule or independence from a colonial power (e.g., Nigeria in 1959), or 3) where a federation breaks up into separate countries (Yugoslavia from 1991-1992).

"Putting Together" and "Pulling Apart"

Admittedly, few moments of federating exactly match these two idealized types. Some cases, such as India, have elements of both "coming together" and "holding together." In India, negotiations between the central government and the various princely states meant that an element of "coming together" was involved. Nevertheless, one type tends to predominate, such as the "holding together" type in India. Since the central government of India had already established its expectation of centralized government, the princely states were not able to maintain their separate judicial systems. Rather than measure the mixture of "coming together" and "holding together" this project codes each case according to its predominant type.

An additional element can play a role. In some moments of federating, force is involved. A military force at the behest of one or more political units can push separate

political units to join together in a "coming together" federation. Stepan calls this phenomenon "putting together" federalism. Coercion can also play a role in moments of "holding together." Armed force can fight for the autonomy or outright independence of one or more administrative units or pieces of territory within a unitary political system. Because no other scholar has coined a term for this concept, this project chooses to call it "pulling apart" federalism.

These concepts emphasize the winning side in the process. The presence of "putting together" federalism does not necessary imply the presence of a countering force of "pulling apart." The forces of "putting together" may face no opposition. Nevertheless, in most situations there is armed resistance to "coming together." Since the "putting together" element ultimately succeeds over whatever "pulling apart" forces that exist, this phenomenon is called "putting together." If the "putting together" does not succeed then there would be no "putting together federalism" because there would be no federalism present. A confederation, unitary system (if "putting together" was overwhelming), or entirely separate countries would have resulted. All "putting together" federations are fundamentally "coming together" federations with the additional element of force, but not all "coming together" federations are "putting together" federations. In fact, it makes more sense to speak of "coming together" federations formed with elements of "putting together" than it does to use the term "putting together federation." "Coming together" is the purer type, while "putting together" is merely an adjective.

The same situation exists with respect to the forces of "pulling apart" and "putting together" in a moment of "putting together." The antagonists of "putting together" resist the transformation of their unitary political system into a "holding together" federation, but the forces of "pulling apart" ultimately win. If the "pulling apart" does not succeed then there would be no "pulling apart federalism" because there would be no federalism

at all. A confederation, unitary system, or entirely separate countries (if "pulling apart" was overwhelming) would have resulted. All "pulling apart" federations are fundamentally "holding together" federations with the additional element of force, but not all "holding together" federations are "pulling apart" federations. In fact, it makes more sense to speak of "holding together" federations formed with elements of "pulling apart" than it does to use the term "pulling apart federation." "Holding together" is the purer more fundamental type, while "pulling apart" is merely adjectival.

Only Discrete, Original, and Formalized Instances of Federal Formation

I limit my study to discrete, original, formalized instances of federal formation. A "discrete" creation of a federation involves only the moment in which a unitary system devolves or multiple countries integrate. In other words, if a unitary political system federalizes to create peripheral legislatures and only later adds a peripheral executive and/or a peripheral judiciary, only the first instance counts as a moment of federal formation. Colombia had subnational legislatures before the 1991 Constitution created elected subnational governors. But only that first step of creating legislatures counts. Even though their study is likely to prove fruitful, the scope of this dissertation does not include those later steps of additional federalization.

Nevertheless, the same country can experience more than one "original" federal moment. If a federal country becomes unitary, it can become federal again, and that second instance counts as a separate federal moment. Kenya, for instance, became federal at its founding in 1963 and again in 2010. A federal country can also experience an additional federal moment if it disintegrates into separate political units and then reunites as a federation. Brazil experienced this when its imperial federation (1834-1889) dissolved and reunited as a federation under the 1891 Constitution.

It would be foolish to contend that a defunct federal arrangement from the past would have no effect in determining the nature of federalism going forward, even under either of those two scenarios that we consider second instances of federal formation for the same territory. If the experience with the first permutation of federalism was good, then it is more likely that the new version of federalism will resemble it. The framers of the new system will want to repeat what had been popular and successful in the past. In some cases, conversely, the preexisting experience with federalism has the opposite effect. The drafters of the new constitution want to get as far away as possible from that previous constitution's style of federalism.

Notwithstanding these concerns, this project treats these later federalizations as unique instances of federalization. Yes, federal ideas remain after a federation turns unitary or disintegrates into its constituent parts, but the process of becoming unitary or separate has extinguished all but the ideational legacy of federalism. In the case of the disintegration of a federation whose constituent parts come together to create a second federation, there are no vestigial apex institutions to affect the process. The founders, of the second instantiation of federalism for a territory, are not institutionally constrained by what came before in the first instantiation of federalism for that territory. The vested interests of an existing national legislature, executive, or judiciary are absent. With respect to a territory's return to federalism after a period of unitarism, all of the peripheral branches no longer constrain the founding process simply because they no longer exist.

Therefore, even if the category of federalism comprises a large and diverse set of political arrangements, it does not extend to all political systems, and this project is not attempting to code all of the political systems of the world.

PART ELEVEN: SOME DIFFICULTIES CODING "HOLDING TOGETHER" AND "COMING TOGETHER" AND DISTINGUISHING THEM FROM EACH OTHER

In some cases, the decision to code a federal moment as "coming together" or "holding together" can be difficult. Many instances of "coming together" are relatively easy to code. Several obviously independent states join together in union. In some of these cases a confederation becomes a federation (e.g., Argentina [1860], United States [1787], and Switzerland [1848]). Confederations lack a central government that is truly autonomous from the member states. For this reason, the transformation of a confederation into a federation belongs to the set of "coming together" federations.

With other examples, a political unit under colonial rule disintegrates into smaller component parts that choose to recombine as a federation (e.g., Venezuela [1811], the United Provinces of New Granada [1811], and the Central American Federation [1823]). In these situations, no intermediate confederal step takes place between disintegration and federation. In still another set of examples, the federating process happens while the political units have still not achieved full independence from a colonial metropole (e.g., Nigeria [1959], Canada [1867], and Australia [1901]). Each colony is directly connected to the government of the colonizers. No central government exists that would connect all of the colonies together and then act as a mediating hub between the metropole and the individual colonies.

Conversely, in Spain's Empire in the Americas, central governments such as virreinatos, reinos, and captaincies did connect the colonies together and then act as a mediating hub between the metropole and the individual colonies. One set of circumstances would have put these colonies through a "holding together" moment. First, one of these larger colonial units would have devolved some autonomy to its constituent units (e.g., provincia, gobernación, intendencia) during Spanish control. Second, the

larger political unit (virreinato, reino, captaincy) would have to achieve independence from Spain. Third, the larger political unit would have to maintain control over at least some of its constituent units, without any lapses. This scenario never occurred with Spain's colonies, but rather, its colonies simultaneously achieved independence and

All of these categories fall under the umbrella of "coming together" federal moments.

Coding Federations that Emerge from Civil Wars

In some "coming together" federal moments, a country creates a federation after a civil war. But civil wars vary in numerous respects such as their length, the scope of territory involved, and the number of deaths. It does not make sense, moreover, to characterize all of those moments as "coming together." The federal moments that occur subsequent to smaller civil wars are better characterized as "holding together." We need to decide when a civil war has sufficiently disintegrated a country such that the subsequent federal moment counts as a moment of "coming together" rather than one of "holding together." But the proper coding of a federation that emerges after a civil war presents challenges. We need, more specifically, to characterize the disintegrative effect of civil wars in a way that does not simply rig our measurements to match our thesis' expected outcomes.

Civil wars end in one of two ways. The overthrow or collapse of a country's government clearly means a moment of "coming together": e.g., Yugoslavia (1991-1992), Somalia (2012), and Ethiopia (1994). Other civil wars reach a stalemate after which the sides negotiate an end to hostilities. At least temporarily, the people and system in power before the civil war maintain their control after the civil war. The federations that follow civil wars that end this way should be coded "holding together." They include

the Central African Republic (2013), Sudan (1972), and the Democratic Republic of the Congo.

Some countries have experienced more than one instance of a federal moment that follows a civil war. Sudan, for example, has experienced more than one civil war that led to a federation. I code Sudan's 1972 federal moment as "holding together" and its 2005-2011 moment as "coming together." The 1972 arrangement provided for judicial centralization, while the 2005-2011 arrangement provided for judicial decentralization. In both cases, South Sudanese rebels did not succeed at overthrowing the national Sudanese government. The second Sudanese civil war and the federation subsequent to it could be exceptions to the rule that "holding together" moments give rise to centralized judicial arrangements. The South Sudanese Liberation army did establish its own courts in the territories under its control. Hence the addition of a subnational judicial system brings with it a factor not common to all civil wars.

Alternatively, we could distinguish the second civil war from the first in order that the federation after the second civil war emerges from a moment of "coming together." The second Sudanese civil war differed from the first in that it caused more casualties, displaced more people, and reached a much higher percentage of the territory. The rebels of the first civil war fought to overthrow the Sudanese government, while the South Sudanese Liberation army of the second civil war fought for South Sudan's independence from Sudan. The interim 2005 constitution created a federation with judicial decentralization, but it also permitted South Sudan to leave the federation in 2011.

Table 3.7 - Distinguishing "Coming Together" from "Holding Together" Federal Moments	
Coming Together	**Holding Together**
Interrupted or Discontinuous Transition from Non-Federation to Federation; No Intermediate Government	Relatively Seamless Transition from Non-Federation to Federation; No Intermediate Government
Newly Elected Constituent Assembly	Current Congress Acts as Constituent Assembly, Legislator of Devolution, or Amending Body
Demographically Malapportioned Constituent Assembly	Demographically Properly Apportioned Constituent Assembly
If Bicameral Legislature, Senators Elected in Accord with Boundaries of Subnational Political Units	If Bicameral Legislature, Senators Not Elected in Accord with Boundaries of Subnational Political Units
Deputies Elected in Accord with Boundaries of Subnational Political Units	Deputies Not Elected in Accord with Boundaries of Subnational Political Units
Genuinely Separate Constituent Political Entities	Constituent Units Mere Administrative Departments of the Whole, Or No Preexisting Administrative Departments at All
Federalism Rooted in Constitution	Federalism Rooted in Constitution, Constitutional Amendment, or Ordinary Law

CONCLUSION

This chapter laid out the methodology that this dissertation uses to justify its inferences about the causes of judicial federalism. The next chapter applies those conceptualizations of the phenomena involved in the creation of judicial federalism. It uses them to hypothesize a relationship between potential independent variables and varieties of judicial federalism. At the same time that the following chapter presents those empirical findings, it articulates an argument intended to explain the creation of judicial federalism. The findings serve as evidence for the argument. Subsequent to the chapter that connects this dissertation's theory to the data that support that theory, four chapters trace the process by which Brazil, the Central American Federation, Germany, and India

became federations. In so doing, those chapters explain why some of those federations adopted centralized judicial systems and others adopted decentralized judicial systems. Finally, the concluding chapter provides a theory to explain some of the exceptions to "the iron law of judicial federalism." Then it points toward research that could build upon this dissertation's conclusions.

PART TWO

CASE STUDIES I

"COMING TOGETHER" FEDERATIONS THAT ADOPTED JUDICIAL CENTRALIZATION

The more one adheres to earlier forms, the easier the whole affair will be arranged; whereas any attempt to spring a fully formed Minerva from the head of the Presidium would lead us into the quicksand of professorial arguments.

—Otto von Bismarck

[A] new and triumphant idea should burst every chain which tends to paralyse its efforts to push forward. National Socialism must claim the right to impose its principles on the whole German nation, without regard to what were hitherto the confines of ***federal states***. And we must educate the German nation in our ideas and principles. As the Churches do not feel themselves bound or limited by political confines, *so the National Socialist Idea* ***cannot feel itself limited to the territories of the individual federal states*** that belong to our Fatherland. The National Socialist doctrine is not handmaid to the political interests *of* ***the single federal states***. One day it must become teacher to the whole German nation. It must determine the life of the whole people and shape that life anew. For this reason we must imperatively demand the right to overstep boundaries *that have been traced by a political development* which we repudiate**.** (***emphasis*** added)

—Adolf Hitler

Chapter Four – Germany

INTRODUCTION[14][15]

The unification of Germany during the second half of the nineteenth century offers another example of a "coming together" federal moment that gives rise to a federation with a decentralized judicial system. This chapter analyzes the stages in the creation of a unified German political system, as it existed before the Weimar Republic (1919-1933). The following discussion connects the "coming together" nature of Germany's federal moment (1866-1871) with that moment's adoption of a decentralized judicial system. In Germany's federal moment we see another case for which the presence of unifying structural factors makes judicial centralization a reasonable expectation. Even though they are not the same preexisting political and legal institutions to which this dissertation attributes causality, certain other preexisting political and legal institutions likely steered Germany's unification process toward judicial centralization.

---

[14] "Je mehr man an die früheren Formen anknüpft, um so leichter wird sich die Sache machen, während das Bestreben, eine vollendete Minerva aus dem Kopfe des Präsidiums entspringen zu lassen, die Sache in den Sand der Professorenstreitigkeiten führen würde." (Bismarck 1866; Keudell 1901)

[15] (Hitler 1939) "Im übrigen wird eine junge sieghafte Idee jede Fessel ablehnen müssen, die ihre Aktivität im Vorwärtstreiben ihrer Gedanken lähmen könnte. Der Nationalsozialismus muß grundsätzlich das Recht in Anspruch nehmen, der gesamten deutschen Nation ohne Rücksicht auf bisherige bundesstaatliche Grenzen seine Prinzipien aufzuzwingen und sie in seinen Ideen und Gedanken zu erziehen. So wie sich die Kirchen nicht gebunden und begrenzt fühlen durch politische Grenzen, ebensowenig die nationalsozialistische Idee durch einzelstaatliche Gebiete unseres Vaterlandes. Die nationalsozialistische Lehre ist nicht die Dienerin der politischen Interessen einzelner Bundesstaaten, sondern soll der-einst die Herrin der deutschen Nation werden. Sie hat das Leben eines Volkes zu be-stimmen und neu zu ordnen und muß deshalb für sich gebieterisch das Recht in Anspruch nehmen, über Grenzen, die eine von uns abgelehnte Entwicklung zog, hinwegzugehen."

Among all of the "coming together" federal moments, Germany's may have come the closest to producing a centralized judiciary.

Preview of this Chapter

The first part of the chapter describes the dependent variable, i.e., the institutional arrangement of the judicial system that belonged first to the North German Confederation (1866-1871) and then to its successor state, the German Empire (1871-1919). The Constitution of the German Empire, especially the parts touching upon the judiciary, did not differ much from the Constitution of the North German Confederation. An analysis of the judicial system of the German Empire, therefore, properly begins by describing the North German Confederation's initial judicial institutions that the Empire inherited and, for the most part, did not alter.

But that does not mean that the judiciary went unchanged from the adoption of the North German Confederation in 1866 to the adoption of the Constitution of the German Empire in 1871. At least in practice, both constitutions empowered the central government with the ability—using ordinary rather than constitutional law—to create a federal judicial system with its own trial, appellate, and apex courts. Many of the member states, especially southern ones, contended that the relevant clauses of the Imperial Constitution did not empower the central government to centralize the judicial system to the extent that those ordinary laws did. For the advocates of legal uniformity, the changes that increased the administrative and organizational centralization of the judicial system constituted merely the unfolding of powers that the central government always had. But for the opponents of those changes, they constituted an evolution inconsistent with the true meaning of the national charters.

In the second part of this chapter, the discussion traces the steps in the creation of Germany's judicial institutions, both those generated by constitutional provision and those later created by ordinary statute. In practice, the two constitutions empowered the national government to increase the centralization of the country's judicial system over time, but they did not enable the federal government to dismantle the member states' judicial systems. Bismarck and his allies in the constituent assembly of North German Confederation fended off liberal attempts to give constitutional status to a federal court system. Only after securing the participation of the southern states did the German Empire enact ordinary law that centralized the administration and organization of all of the courts in the country. Part Two concludes by describing the legal and institutional changes that took place before 1866.

After presenting both the dependent variable and its evolution, the chapter proceeds in Part Three to detail the negotiations that decided all of the North German Confederation's initial set of institutions. The adoption of the Constitution of the North German Confederation involved both individual treaties between the princely sovereigns of the member states and a relatively democratic constituent assembly. In both processes, Prussia had far greater influence than any other single German state. From above, Prussia dominated the process by initiating a series of lopsided treaties. From below, Prussia dominated the constituent congress that debated and ultimately adopted the Constitution itself.

Part Four contains a description of the wider societal and political context for the creation of the North German Confederation and the German Empire. The analysis chronologically analyzes the non-federal political systems that preceded the North German Confederation, beginning with the Confederation of the Rhine that Napoleon created through a mixture of negotiation and imposition (1806-1813). That political

system disintegrated as soon as the first French Empire collapsed in 1813. The examination of the precursor states continues with the German Confederation (1815-1866) that managed to bring Austria and Prussia under the same confederal umbrella. Germany's defeat of Austria in 1866 effectively killed the German Confederation. The discussion also illustrates the significance of the Zollverein customs union (1834-1919) for the birth of the North German Confederation, in the final section of this chapter's discussion of the societal and political context.

The Fifth Part of the chapter indicates how structural factors present at Germany's federal moment predicted judicial centralization for the North German Confederation and the German Empire. It aims to demonstrate how certain preexisting institutions involved the process overcame these structural variables and engendered a decentralized judiciary. With respect to culture, ethnicity, national sentiment, economic integration, territorial size, broken topography, and religion, we would have expected judicial centralization for the North German Confederation and the German Empire.

PART I: GERMANY'S JUDICIAL INSTITUTIONS FROM 1866 TO 1871

At first glance, the Constitution of the North German Confederation contains relatively little that expressly touches upon the judiciary itself. Many of the adjudicative functions generally thought necessary to a federation, and typically entrusted to an independent court, belong to the legislative branch of the Confederation. All conflicts between the federation and one or more member states, between member states, and between the federal executive and legislature went to the Federal Council. That arrangement, with respect to controversies unique to federations on the one hand and political systems political systems with a separation of powers between the executive and legislature, did not change with the adoption of the Imperial Constitution.

With respect to substantive and procedural law for the entire country, the constitutions of the North German Confederation and the Empire implied a desire for bringing uniformity to a patchwork of legal codes across the German states. A later section of this chapter will discuss how those provisions allowed for significant centralization of the judiciary over the course of the existence of both the Confederation and the Empire.

Location and Structure of Constitutional Provisions Related to the Judiciary

Those parts of the Constitution that implicate the judicial role occur in various places. The discussion of the Federal Council takes place near the beginning of the Constitution in Articles 6-10 (UK 1871, 298-299), while the discussion of its judicial roles takes place near the end of the Constitution in Articles 74-79 (UK 1871, 312). The section on the Confederation's ability to legislate certain substantive and procedural codes occurs near the beginning (UK 1871, 298), and, not long after that section, the articles on the standing committees of the Federal Council mentions a committee to handle matters of the "judiciary" (*für Justizwesen*) in Article 8 (UK:1871ty p. 299).

The Federal Council

The Federal Council served as the arbiter in most of those circumstances that in other federations would require some version of a federal supreme court. Disagreements between members of the Confederation went directly to the Federal Council for resolution (Article 76):

> Disputes between different Federal States, if not concerning private right111, and as such to be decided by the competent judicial authorities, are to be settled by the Federal Council on the appeal of one of the parties. Constitutional disputes in those Federal States whose constitution does not appoint an authority for the decision of such disputes, are to be amicably arranged by the Federal Council on

> the application of one of the parties, or if that cannot be done they are to be settled in the way of Federal legislation.[16] (UK 1871, 312).

When a member state did not have its own internal arbiter for domestic constitutional disputes, the Federal Council was available to resolve the issue. The Constitution also empowered the federal government to pass a law to decide between the parties to that type of disagreement. The Federal Council also had the power to review an individual's complaint against one of the state governments. The complaint could arise from something that the state government did or failed to do. It could also come as the result of the plaintiff's belief that the judicial system of a member state failed in the process of meting out justice (Article 77):

> If a case of denial of justice should occur in a Federal State, and sufficient relief cannot be obtained by way of law, it belongs to the Federal Council to receive the complaints as to the refused or obstructed administration of justice when proved according to the Constitution and the existing laws of the Federal State concerned, and to afford the legal redress therein in regard to the Federal Government which has given cause for the complaint.[17] (UK 1871, 312)

> In those instances that someone commits an offence against the Confederation, the Constitution, the Federal Council, a federal legislator, the Diet, or an official of the Confederation, the judicial systems of the particular member states have the responsibility to try and punish (Article 74):

12[16] "[1] Streitigkeiten zwischen den verschiedenen Bundesstaaten, sofern dieselben nicht privatrechtlicher Natur und daher von den kompetenten Gerichtsbehörden zu entscheiden sind, werden auf Anrufen des einen Theils von dem Bundesrate erledigt. [2] Verfassungsstreitigkeiten in solchen Bundesstaaten, in deren Verfassungen nicht eine Behörde zur Entscheidung solcher Streitigkeiten bestimmt ist, hat auf Anrufen eines Theiles der Bundesrat gütlich auszugleichen oder, wenn das nicht gelingt, im Wege der Bundesgesetzgebung zu Erledigung zu bringen." (Bund:1867)

[17] "Wenn in einem Bundesstaate der Fall der Justizverweigerung eintritt, und auf gesetzlichen Wegen ausreichende Hülfe nicht erlangt werden kann, so liegt dem Bundesrate ob, erwiesene, nach der Verfassung und den bestehenden Gesetzen des betreffenden Bundesstaates zu beurtheilende Beschwerden über verweigerte oder gehemmte Rechtspflege anzunehmen, und darauf die gerichtliche Hülfe bei der Bundesregierung, die zu der Beschwerde Anlaß gegeben hat, zu bewirken." {Bund:1867wm}

> Every undertaking against the existence, the integrity, the security, or the constitution of the North German Confederation, finally, any offence against the Federal Council, the Diet, a member of the Federal Council or the Diet, an authority or a public functionary of the Confederation, whilst in the exercise of their functions, or in reference to their functions, by word, writing, printing, signs, figurative or other representation, are to be judged and punished in the separate Federal States according to the laws now existing therein or hereafter coming into operation, by which a similar action against the separate Federal State, its constitution, its Chambers or Estates, or its members thereof, its authorities and functionaries would be judged.[18] (UK 1871, 312)
>
> The political systems of the member states are to deal with such offenses the same way that they deal with those same offenses when committed against those member states themselves. In those situations where the offense reaches the level of something that would be considered treason if committed against a member state, a particular preexisting court called the Supreme Court of Appeal of Lubeck was to handle to issue from first to last instance (Article 75).
>
> For those undertakings against the North German Confederation described in Article 74, which would be characterized as high treason or State treason if directed against a separate Federal State, the Supreme Court of Appeal at Lubeck, common to the three Free and Hanse towns, is the competent deciding authority in first and last instance.[19] (UK 1871, 312).

Possibility for the Creation of a Federal Court through Ordinary Law

Neither the adopted Constitution nor Bismarck's draft constitution included a constitutionally embedded federal appellate court to review the private and criminal law

18 "Jedes Unternehmen gegen die Existenz, die Integrität, die Sicherheit oder die Verfassung des Norddeutschen Bundes, endlich die Beleidigung des Bundesrathes, des Reichstages, eines Mitgliedes des Bundesrathes oder des Reichstages, einer Behörde oder eines öffentlichen Beamten des Bundes, während dieselben in der Ausübung ihres Berufes begriffen sind oder in Beziehung auf ihren Beruf, durch Wort, Schrift, Druck, Zeichen, bildliche oder andere Darstellung, werden in den einzelnen Bundesstaaten beurtheilt und bestraft nach Maaßgabe der in den letzteren bestehenden oder künftig in Wirksamkeit tretenden Gesetze, nach welchen eine gleiche gegen den einzelnen Bundesstaat, seine Verfassung, seine Kammern oder Stände, seine Kammern- oder Ständemitglieder, seine Behörden und Beamten begangene Handlung zu richten wäre." {Bund:1867wm}

19 "[1] Für diejenigen in Art. 74 bezeichneten Unternehmungen gegen den Norddeutschen Bund, welche, wenn gegen einen der einzelnen Bundesstaaten gerichtet, als Hochverrath oder Landesverrath zu qualifiziren wären, ist das gemeinschaftliche Ober-Appellationsgericht der drei freien und Hansestädte in Lübeck die zuständige Spruchbehörde in erster und letzter Instanz." (Bund 1867)

decisions of the courts that belonged to the member states. But Article 75 in the Constitution did contain enigmatic language that appeared to make this possible:

> The detailed regulations as to the competency and the procedure of the Supreme Court of Appeal will be settled in the way of Federal legislation. Until the passing of a Federal law the competency, as hitherto existing, of the Courts in the separate Federal States and the regulations relating to the procedure therein, will continue applicable.[20] (UK 1871, 312)

In context, these words seem to apply only to procedural and organizational law related to the offenses mentioned in Article 74. But, during later debates over the national laws that brought uniformity to the organization and administration of the member states, some defenders of these legislative prerogatives pointed to the language in this clause. The first part of Article 75 requires that the Article 74 offenses at least ultimately go to the appellate court in Lubeck. But the second part of Article 75 seems to imply not only that the federal legislature can expand the role of the Lubeck appellate court. It would also seem to empower the federal government to rearrange the "competency" and "procedure" of the courts that belonged to the member states. Those two terms could easily imply the power to legislature court organization and administration for the courts of the member states. Over time, debate and legislative practice liquidated the meaning of the judicial provisions found in the Confederation Constitution. Eventually a consensus emerged because the majority insisted on its interpretation and had the power to make it a reality.

---

[20] "[2] Die näheren Bestimmungen über die Zuständigkeit und das Verfahren des Ober-Appellationsgerichts erfolgen im Wege der Bundesgesetzgebung. Bis zum Erlasse eines Bundesgesetzes bewendet es bei der seitherigen Zuständigkeit der Gerichte in den einzelnen Bundesstaaten und den auf das Verfahren dieser Gerichte sich beziehenden Bestimmungen. (Bund 1867)

Prerogative to Bring Uniformity to the Legal Codes of the German States

The Constitution explicitly empowered the central government to write a national uniform code for the law of obligations, criminal law, trade law, financial law, and the procedural law for each of these substantive areas. This extensive list in the Constitution lacked only one of the major areas of law. It did not give the central government the ability to write either substantive or procedural civil law. Article 4, No. 14 read:

> The following matters are subject to federal supervision and legislation: … the common legislation on the law of obligations, criminal law, trade and bills of exchange and judicial procedure[21] (UK 1871)

The central government would have to pass a constitutional amendment in order to make national legislation for civil disputes. That change, in fact, did not occur during the creation of the North German Confederation, the life of the North German Confederation, or the creation of the German Empire. Only in 1872 did the amendment take place, and the legislation did not take effect until 1900 (Ledford:1993, 182; 192).

PART II: THE EVOLUTION OF THE JUDICIAL INSTITUTIONS OF THE NORTH GERMAN CONFEDERATION AND THE GERMAN EMPIRE

The Judiciary in the Creation of the North German Confederation

Several delegates to the constituent assembly creating the North German Confederation suggested that the Constitution contain a court to deal with conflicts between states, between the states and the central government, and between the executive and the legislature. Ludwig Winhörst, a representative from Hanover, submitted an amendment to create a supreme federal court (Carroll 1967, 99). Bismarck's initial draft

[21] "Der Beaufsichtigung Seitens des Bundes und der Gesetzgebung desselben unterliegen die nachstehenden Angelegenheiten: die gemeinsame Gesetzgebung über das Obligationenrecht, Strafrecht, Handels- und Wechselrecht und das gerichtliche Verfahren;" {Bund:1867wm}

did not contain a provision for a federal court to resolve disputes between member states. He likely believed that settling those types of disputes in the Federal Council better served Prussia's interests. He probably expected Prussia to dominate, if not control, the Council. Even if Prussia had less influence over the Federal Council than Bismarck expected it to have, it would have less influence over any federal court than it would have over the Federal Council. Prussia's King chose the judges because he was also the chief executive of the Confederation.

Dormant Power to Centralize the North German Confederation's Judicial Institutions

An earlier section of this chapter mentioned two major instances of ambiguity in sections related to the judiciary found in the Constitution of the North German Confederation. The legislative prerogatives of the central government mentioned in Article 4, No. 13 could be understood to mean that the ability to write procedural law implied the power to regulate the administration and organization of the member states' court systems. The powers of the central government to regulate appellate court organization found Article 75 also could be understood to imply the power to regulate the administration and organization of the member states' court systems.

Bismarck's infamous "Putbus Dictations" (also called the "Putbus Memorandum") contain evidence that he wanted the North German Confederation's Constitution to both look decentralized on the surface and contain the tools necessary for centralizing it. He understood that the Confederation's constitutionalized institutions would have to seem decentralized to the southern German states, especially Bavaria; but he also recognized that amending a constitution typically required greater consensus than did enacting or reforming an ordinary law. When Bismarck was convalescing in Putbus during the fall of 1866, only drafts of the North German Confederation existed.

Amendments to the eventual Constitution required a two thirds majority. In reference to some of those draft constitutions that various jurists had proposed for the North German Federation's Constitution, Bismarck commented:

> They are too biased toward a centralized federal state to allow the future accession of the South Germans. In form, it will have to tend more toward a confederation of states; in practical terms, however, it can be given the character of a federal state through the use of elastic terms that are seemingly inconspicuous but actually far reaching in implication.[22]

At first it might seem that this set of facts actually undermines the applicability of this dissertation's thesis to Germany. This chapter contends that the limitations that resulted from preexisting institutions destined the North German Confederation for judicial decentralization. According to an objection to that thesis, The constitutional provisions regarding the judiciary were so vague that Bismarck and his allies were able to use them to justify and effect whatever ordinary laws they wanted for the Confederation's judicial system. According to that same criticism of the applicability of this dissertation's thesis to the Confederation, the judicial provisions of the Constitution, in fact, did not prevent the North German Confederation's legislature from passing the law that made court organization in all of the member states uniform. In other words, because the judicial provisions have no obvious meaning, the North German Confederation had judicial centralization all along even if it did not manifest itself until 1872.

But two pieces of evidence contradict that conclusion. First, Bismarck did not have the Confederation legislate a uniform civil code until the Constitution was amended to make it possible. In this case, the constitutional provisions regarding the judiciary were

[22] "Sie sind zu zentralistisch bundesstaatlich für den dereinstigen Beitritt der Süddeutschen. Man wird sich in der Form mehr an den Staatenbund halten müssen, diesem aber praktisch die Natur des Bundesstaates geben mit elastischen, unscheinbaren, aber weitgreifenden Ausdrücken. Als Zentralbehörde wird daher nicht ein Ministerium, sondern ein Bundestag fungieren, bei dem wir, wie ich glaube, gute Geschäfte machen, wenn wir uns zunächst an das Kuriensystem des alten Bundes anlehnen."

clear enough to prevent the Confederation from legislating with respect to civil law. At least a majority of the member states believed this more narrow interpretation of the unamended Constitution.

Second, even as far as the putatively vague language allowed court reorganization law to go, the ordinance did not take the judicial appointment, removal, funding, or salary controls away from the member states. At least a majority of the member states understood the judicial provisions in the Constitution to mean considerable uniformity in the organization of the member state judicial systems. Not enough member states thought that the judicial provisions of the Constitution enabled the central government to take those more closely held judicial prerogatives away from the member states. The preexisting institutions—of both the member court systems themselves and the separateness of the member states before the creation of the Confederation—made such centralization essentially impossible.

Changes Made through Ordinary Law to the Judiciary of the Confederation and the Empire

The central government made use of its powers to legislate regarding appellate courts, a federal court, and national legal codes. The first federal court of the Confederation, the Supreme Court of Appeal at Lubeck, only handled instances of treason against the Confederation as the court of both first and last instance. The central government was simply using the Lubeck court, which had its own functions as the highest court for some of the member states, for one type of offense against the federal government. But neither the government of the Confederation not that of the Empire ever passed legislation to make the court happen . Constitutional status did not guarantee actual existence.

The Confederation created another federal court in 1869, the Federal Supreme Trade Court (*Reichsoberhandelsgericht*). It functioned as the highest court of commercial law in the entire country and took appeals in commercial cases from the courts in the member states. The central government did not have to amend the Constitution in order to create the Court or change the administration and organization of the member state courts with respect to commercial law. The Federal Council nominated the Court's judges, and the Federal Cabinet appointed them. The creation of the Trade Court came only days after the adoption of the General German Commercial Code (*Allgemeines Deutsches Handelsgesetzbuch*). The Constitution clearly empowered the central government to enact the code, but the language in the Constitution regarding procedural law does not as clearly empower the central government to create a federal commercial court, let alone reorganize how courts in the member states send appeals in commercial law to that court. But, because none of the legislators in the Diet or the Federal Council objected to its passage, the law seems consistent with the Constitution. The Confederation did not create any more courts or legal codes.

Changes Made through Ordinary Law to the Judiciary of the Empire

Over the course of the life of the Empire, the central government wrote codes of substantive law and procedure in multiple subjects. As mentioned earlier, the Constitution of the Judiciary Act (*Gerichtsvefassungsgesetz*) was enacted in 1877 and took effect in 1879, reorganizing the entire court system. That same year, new codes of substantive and procedural criminal law took effect. At least in part because commercial law was already relatively unified it member states, Germany did not adopt a commercial code until 1871. A national bankruptcy code took effect in 1879. In 1896, a law regulating stock exchanges took effect. Again, only the changes in "civil law," both

procedural and substantive, required the constitutional amendment that took place in 1873. But in that case, and in all others, the passage of the relevant procedural law affected not only how a particular court case took place. The ability of the national government to enact procedural law was interpreted to mean the ability to the national government to enact court regulations for court organization and administration.

The new laws included provisions that rearranged the administration of the member state courts and the appellate organization of the entire country down to the member states.

Bismarck as Enigma on Judicial Centralization?

Bismarck's centrality to the unification process makes his intentions for the judicial system relevant to a proper understanding of the North German Confederation's Constitution. Ledford presents a detailed discussion of Bismarck's intentions that he prefaces with the comments that they are "hard to define" (Ledford 1993, 178). Some of Bismarck's clearest statements regarding national unification connected it to legal uniformity:

> For me it is an absolute impossibility, it would be a complete denial of my past, if l here agreed to a proposal that sanctions the principle that two kinds of law should be created for North Germans by the Confederation (Quite right!) ... I would prefer, gentlemen, to accept a unified penal code that I was convinced was deficient ... From this standpoint, I cannot recognize any Oldenburg, any Prussia: I recognize only North Germans! (Lively Bravo!) (Bismarck 1929, as cited and translated in Ledford 1993)

Even though that speech took place in 1870 after the adoption of the Constitution of the North German Confederation, rather than during the process of adopting it, Bismarck at least publicly said that a unified penal code would further the integration of the German states. The historian Otto Pflanze agrees that "Bismarck had long believed

that unity in law and justice would contribute greatly to the consolidation of the Reich, a conviction shared by most liberals" (Pflanze 1990, 347).

Precursor Judicial Institutions to the North German Confederation

The proto-federations that preceded the North German Federation did not have judicial institutions whose jurisdictions extended over the entirety of their organizations' membership. In every case, the judicial systems of the member states handled domestic disputes. In civil law disputes where the parties belonged to different member states, the trial took place in the court system of the plaintiff's member state. The loser in the case could not appeal to any court outside that member state's judicial system, because no such court existed. Criminal cases followed the same jurisdictional rules.

Austria's Metternich successfully resisted calls for the inclusion of a federal court during both the creation and institutional evolution of the German Confederation. But at least as late as 1862, a federal reform movement had not stopped advocating for the establishment of a federal court to resolve disputes between states within the German Confederation (Jansen 2011, 161). In fact, they called for a federal court that could not only authoritatively interpret the federal constitution but also one that could do the same for member state constitutions. But, instead of resolving their disagreements through a semi-autonomous court with constitutional status, the German Confederation resolved disputes in its Diet.

The Zollverein also lacked a judicial branch. Disagreements over economic issues, such as accusations of violations against the tariff agreements, went to the Zollverein's legislative branch, where the majority's opinion decided any matter.

Increasing Uniformity Among the Legal Codes of the German States

As the German states became increasingly interconnected through their economies, they adopted identical legal codes on many subjects. One of the earliest examples, the General German Bill of Exchange (*Allgemeine Deutsche Wechselordnung*), became law under the short-lived Frankfurt National Assembly of the revolutions of 1848. The law regulates bills of exchange as well as the rights of both debtors and creditors. Among the member states under the German Confederation, fifty six often conflicting laws governed this area of the law.

Prussia had initiated the process by proposing a draft law in 1847 at a specially-convened conference of members of the Zollverein, for the specific purpose of developing a law to deal with this subject. Even many non-members of the Zollverein participated. But neither the special conference nor the Zollverein had the authority to turn this draft into a law. Prussia encouraged member states to enact their own codes with language identical to the model set out in the draft. But before many German states had adopted a version of the model code, the revolutions of 1848-1849 broke out across the region. The German Reich of the March Revolution of 1848 proved still born, but, as it happened, the General German Bill of Exchange emerged as the only legislation that the Reich's Diet in Frankfurt enacted into law (Frankfurter Nationalversammlung 1877).

German states responded in a variety of ways to the near simultaneous passage of the law with the collapse of the government that had adopted it, putatively for all of the German states that had sent delegates to the Frankfurt Diet. Some German states adopted the law as their own code, while referring to it as the Reich's law. Other states passed it as a state law but prefaced it with an introduction. Still others published it as the Reich's law without formally adopting it as a piece of domestic legislation. Some courts, such as those in Kurhessen and Schaumburg-Lippe held against the applicability of the law,

unless their states' Diet adopted it as domestic law. But in all of these cases, the uniformity of the code further tightened the economic ties between the German states (Pannwitz 1999, 214). The code's authoritativeness for all of the German states grew so much that Bavaria officially contended that the law applied to all of Germany, excepting only Luxembourg, Limburg, Kurhessen and Schaumburg-Lippe (Huber 1978, 787). In 1869, the German Confederation ultimately enacted the code as a law now applicable to all of its member states (Huber 1978, 787), except for Austria.

With its adoption of the Paulskirche Constitution of 1849, the Frankfurt Diet also initiated the development of a uniform commercial code for the German states. The Constitution empowered the Diet to legislate in this area. Even though the Frankfurt Diet did no more than issue its "draft of a general commerical code for Germany" (Entwurf eines allgemeinen Handelsgesetzbuches für Deutschland), it set the stage for Bavaria to propose a similar law. In 1856, at the Diet of the German Confederation, Bavaria called for a convention (Bergfeld 1987, 107, Fn. 9), with Prussia insisting that it take place in Nuremburg (Bergfeld 1987, 109). Bismarck succeeded in making his draft the precursor to the code, thereby making it better attuned to the industrial states of the North than just to the agrarian states of the southern Germany (Bergfeld 1987, 108 et seq.), such as Bavaria. In 1861 the law's proponents encouraged the German Confederation's member states to make it part of their individual commercial codes. The General German Commercial Code (*Allgemeines Deutsches Handelsgesetzbuch*) effectively became the commercial code for all of the member states (Bergfeld 1987, 113).Part III: The Negotiations that Created the North German Confederation and the German Empire

The North German Confederation (*Norddeutscher Bund*)

This "confederation" was in fact a federation, but not because the members of its "lower" legislative house gained their seats through direct election. It was a federation because it had both national and subnational institutions with independent authority. The North German Confederation had a national supreme court that connected the judicial systems of the constituent units. The confederation also had a chief executive in the form of the Prussian Kaiser.

The legislature the North German Confederation consisted of two houses, the Federal Diet or Reichstag and the Federal Council or Bundesrat, which comprised the representatives from the states. Elections to the Federal Diet were based upon universal suffrage for men above the age of 25. The North German Confederation lasted from July 1867 until December 1870 when it was transformed into the German Empire:

> Nevertheless, it is indisputable that when the constitution of the North German Confederation was being drawn up, the further goal of full German unification was never far from the minds of those involved. On this ground alone, the sovereignty of the individual states could not afford to be drastically curtailed, at least in the formal sense. A non-revolutionary re-drawing of the political map of Germany would never have been feasible without the more or less voluntary consent of the German princes, even though Bismarck had no compunction in showing a complete disregard for the principle of monarchical legitimacy in particular cases" (Mommsen 1995, 25).

PART IV: SOCIAL, ECONOMIC, HISTORICAL, AND POLITICAL CONTEXT FOR GERMANY'S FEDERAL MOMENT

Tracing the Process of Federal Formation in Germany

The creation of the North German Confederation had multiple sources. One was economic. The German state of Baden had attempted in 1819 to convince the *Deutscher Bund* to adopt a customs union. When that effort failed, Bismarck began creating the Zollverein in parallel to the *Deutscher Bund*. Once Prussia no longer needed the

Deutscher Bund for military purposes, and there was no need for it economically, Bismarck had fewer incentives to remain within it.

Another cause was military. Bismarck became convinced that Prussia no longer needed the *Deutscher Bund*. When Austria lost to France in 1859, the French abided by Prussia's warning not to invade any German lands east of Austria. This development was taken to mean that not only had the Prussian military at least equaled the Austrian one in the eyes of the French, but also that Prussia no longer needed the *Deutscher Bund* for security.

The rivalry between Austria and Prussia was also responsible for the dissolution of the *Deutscher Bund*. Bismarck decided that Prussia could not tolerate the transformation of the *Deutscher Bund* into a federation with Austria at its head. In addition, Prussia could not countenance any German federation with Austria, instead of Prussia, in the position of full leadership. Austria repeatedly convinced the other members of the *Deutscher Bund* to side with it against Prussia in the decisions made by its confederal legislature.

The refusal, on the part of the other German states, to strengthen the central institutions of the *Deutscher Bund* also played a role in its demise. On more than one occasion, the *Deutscher Bund* agreed to constitutionally invest itself with a central power but then failed to enact legislation to activate that prerogative. The constitution entrusted the Federal Diet to create a customs union, but the Diet never acted. In 1834, Metternich convinced the major parties of the *Deutscher Bund*, such as Bavaria and Prussia, to a resolution to create a federal appeals court or court of arbitration (*Schiedsgericht*) to deal both with 1) disputes between sovereigns and their people and with 2) disputes between German states (Nicolson 1875, 19; Taylor 1945, 56). The Diet accepted this amendment to the constitution, but it never took the steps to create the court (Howitt 1842, 514).

The immediate cause of the destruction of the *Deutscher Bund* ironically involved the core purpose of the confederation: security. The Diet of the Confederation could vote to "intervene in any of its member states because of a disturbance within that state. It could also vote to "execute" military operations against any of the member states that violated the rules of the *Deutscher Bund* (Koch 1984, 17-18). The member states could engage unilaterally only in defensive wars that did not involve the Diet. They could not make declarations of neutrality without the permission of the Diet, and neither could they unilaterally adopt an armistice with any belligerent against which the Diet had voted to fight. The Constitution of the *Deutscher Bund* required that all military actions be defensive (Koch 1984, 16).

The *Deutscher Bund* voted to intervene "defensively" against the Danes in Schleswig and Holstein in 1863. But, in the aftermath of the victory, Austria condemned Prussia's administration of those two captured territories. Of course, Austria had a less humanitarian reason for trying to turn Prussia into Europe's pariah. The strength of Prussia's military, only suggested in 1859—when France defeated Austria but chose not to challenge Prussia—had now become obvious. In response to Austria's accusations, Prussia seceded from the *Deutscher Bund*. Technically, secession violated the constitution of the ostensibly "eternal" union of the *Deutscher Bund*. Austria convinced the remainder of the Diet of the *Deutscher Bund* to vote for military action against Prussia. The Prussian military handily defeated the military of the *Deutscher Bund* in 1866, confirming what Austria's loss to France in 1859 had suggested. Prussia was now the strongest German power. Not only Prussia it decisively defeated Austria and several other German states, it had done so in such a short period of time. Because the Austro-Prussian war only lasted from June 14th until August 23rd, historians have dubbed it the Seven Weeks' War.

The war was not without consequences for the losers. Austria was no longer part of the *Deutscher Bund*. Schleswig and Holstein were united as the Prussian province of Schleswig-Holstein. Hanover became a province of Prussia. Hesse-Darmstadt surrendered territory to Prussia. Prussia received Nassau, Hesse-Kassel, and Frankfurt as part of its new province of Hesse-Nassau. Nevertheless, this consolidation still left twenty one other German states to join with Prussia to form the North German Confederation. The fact that Prussia subsumed territories should not be confused with the idea that it forced these twenty one German states into the North German Confederation in a form of "putting together" federalism.

In order to understand Bismarck's goals in the creation of the North German Confederation, we must first consider Prussia's menu of options both before and after the Austro-Prussian War. Immediately before the Austro-Prussian war, Bismarck had considered internally strengthening the *Deutscher Bund* both by changing its institutions and by ejecting Austria, but Bismarck knew that the southern states such as Bavaria would be uncomfortable with such a plan (Carroll 1967, 30-31). A balance of power existed between Prussia and Austria within the *Deutscher Bund*. Removing either one of those economic, demographic, and military behemoths would place all of the other member states at the mercy of the remaining behemoth. Religious differences also existed. Prussia was predominantly Protestant, whereas the southern states and Austria were Catholic.

Structural Diversity

Ethnicity and National Sentiment

It is impossible to know if the populations that existed within the German states in 1867 were more similar to each other than any one of them was to the non-German

populations in their geographic vicinity. There was no systematic effort to evaluate genetic differences empirically let alone the ability to evaluate them scientifically. German intellectuals of the time spoke of a German race and had a rudimentary understanding that children looked like their parents, but they had no empirical way to say who was genetically German and who was not. History does suggest that the populations of the German states did have common ancestry.

Julius Caesar was the first one to write about Germania (Germany), which he distinguished from Gaul (France). He and later Tacitus made note of cultural differences between these two regions. In his *Commentarii De Bello Gallico* Caesar considered them immigrants from Gaul that had centuries ago settled in Germania. He noted that they had defended themselves from the invading Cimbri and Teutones, increasing the odds of greater genetic uniformity. The peoples of this region received an additional opportunity for homogenization when in 9 C.E. the Romans lost to the Germanic leader Arminius and left what they called Gran-Germania alone for the rest of the existence of the Roman Empire. No major periods of immigration to Germania happened thereafter. Genetically, the peoples of the German states were probably similar, at least in comparison to other populations of roughly the same size and dispersed to roughly the same degree.

Even though the territories that would constitute the German Empire in 1871 contained some ethnic diversity, these communities were moving toward an ideology of pan-Germanism, and their collective political history acted as prologue to this ethnic homogenization. The argument laid out here is not focused on these older political systems as institutions that stimulate unification directly, but rather, it contends that these institutions encouraged a sense of nationalism that in turn fomented unification. When discussing the direct role of institutions, this study means the institutions that exist on the eve of the creation of the federation.

Political systems cannot create a nation out of many nationalities immediately or even in the medium term, but during an extended period of time political linkages can facilitate the intermingling of cultural differences. The integration of the cultures and peoples of large territories is difficult. The Roman Empire did not make the peoples of Gaul and Greece indistinguishable from each other. Nevertheless, over the smaller territory of Italy the empire achieved much greater cultural blending. That the German Empire of 1871 was not the first political system that contained all of these peoples made the German peoples less dissimilar than their political disunity in 1865 would suggest. They all knew, from Bavaria to Prussia, that they had been part of the same larger political systems.

The Kingdom of East Francia otherwise known as the Kingdom of Germany (843-963), the Holy Roman Empire (963-1806), Napoleon's Confederation of the Rhine (1806-1813), and the German Confederation (1815-1865) consisted almost entirely of only those territories that would constitute the Empire of 1871. In 843 with the Treaty of Verdun, the Carolingian Empire became three different kingdoms, East, West, and Middle Francia. East Francia contained most of present day Germany. Middle Francia contained some parts of modern Germany as well, but the other two kingdoms divided it among themselves by 870. From the end of the 11th century, all of the territories of Imperial Germany had been tied together under the Holy Roman Empire.

As the centuries proceeded, the persistence of a predominantly German core to the Empire became increasingly prominent. Near the end of the 15th century the Empire was sometimes called the Holy Roman Empire of the German Nation because it had lost nearly all of its Italian, Bohemian, and other non-German territories. The end of the Thirty-Years' War and the treaty of Westphalia in 1648 deprived the Empire of territories such as the Swiss Confederation and the Northern Netherlands. Georg Schmidt contends

that, between 1495 and 1806, the Holy Roman Empire was the political system of the German people (Schmidt 1999, 347-354; Smith 2011, 4).

Both this shared history and the experience of being within the same political system acted as centripetal forces for the populations that would inhabit the German Empire in 1871. Stephen Barbour notes how the political institutions of the Empire and the uniqueness of the German language worked synergistically. He argues that "the great importance of the German language as a mark of national identity possibly reflects the fact that a Continental West Germanic ethnic group emerged during the Middle Ages demarcated by language, but demarcated in a rather negative way as those inhabitants of the Holy Roman Empire (Heiliges römisches Reich deutscher Nation) who did not speak Romance or Slavonic languages" (Barbour 2000, 160).

Not only had the peoples of greater Germany lived within the same political system over centuries, but also during the seventeenth century German intellectuals such as Johann Gottfried Herder intensified their advocacy of the idea of a German people. Rohan Butler observes that to "this national organism Herder attached exceptional significance. Patriotism for him was almost the touchstone of individual worth. 'He that has lost his patriotic spirit has lost himself and the whole world about himself'" (Butler:1942, 25).

On the eve of the French Revolution, the majority of the Holy Roman Empire's territories were German. The non-German portions included only those areas that would become the Netherlands, Belgium, the Czech Republic, Slovakia, and Luxembourg. When Napoleon succeeded at Austerlitz in 1805 he dissolved the Holy Roman Empire and reorganized the German states into three political units: The Confederation of the Rhine, a smaller Prussia, and a reduced Austria (Henderson 1959, 2). Even at this stage, there were hints of a spirit of German national unity. Crown Prince Ludwig of Bavaria, a

strong proponent of German nationalism, convinced his father to abandon the Confederation of the Rhine during the wars of liberation (Koch 1984 4). In Württemberg a pro-German unity alliance between nobility and the middle class resisted King Friedrich's imposition of his constitution.

After Napoleon's defeat, his previous incursions into the German states convinced their political elites that a greater Germany was necessary to prevent such costly invasions in the future (Koch 1984, 18). The other powers of Europe also insisted on it. German nationalism was on the rise after the Napoleonic Wars in part because of the perception that a unified Germanic political system would make the German states less vulnerable. Any doubt as to the idea that security was the primary concern driving confederation disappears if one realizes that the deadlock in the committee to form the confederation evaporated when Napoleon escaped and attempted to regain his empire. After the rest of Europe defeated Napoleon the second time, the number of states was reduced from over 300 to 38 in a process of consolidation (Henderson 1959, 1-3). Repeated iterations of these somewhat arbitrary reorganizations weakened the ties that Germans had to their original states and cities.

John Breuilly notes that nationalism played a role in unification:

> So far as the more general role of nationality is concerned, perhaps we should think of it as a ratchet on a wheel. It does not push the wheel forward but it prevents the wheel slipping back. The strong development of German institutions and movements under modem conditions did not directly prescribe the formation of a German nation-state. It did, however, preclude the destruction of a German political, economic and cultural zone. Within that zone, the only form a German nation-state could take was that of the Prusso-German state (Breuilly 1996, 109).

According to A.J.P. Taylor, the sense of peoplehood among the Germans played an important role in the course of German history:

> It may seem a platitude to count the German people as the third permanent factor in German history; but it is a platitude which [sic] is often overlooked. The German national state is new; but the consciousness of German national existence is old, certainly older than the consciousness of Spanish national existence, perhaps older than that of England or France. The Germans have been, for more than a thousand years, unmistakably a people; though that does not imply that they have always been the same sort of people (Taylor 1945, 14).

Skeptics of the role of nationalism in unification make a mistake when they suggest that most German liberals opposed German nationhood. Most historical resistance to nationhood stemmed not from an immediate distaste for the envisioned fatherland, but rather, it originated in a desire for liberal constitutional democracy in place of monarchy. The sense of nationhood progressed separately and sometimes in opposition to political unification, at least among the proponents of constitutionalism, democracy, and liberalism (Jansen, 2011).

Opponents of absolutism and monarchy did not want German nationalism and political unification if it would get in the way of liberal reform. They opposed the idea that monarchy and love for the fatherland were compatible rather than the idea of a German nation. Their resistance to nationhood should be understood in this light. During the popular resistance to French occupation between 1813 and 1815, the goals of the liberals and the nationalists coincided (Luke 2009). Schroeder notes that, even though scholars such as A.J.P. Taylor dismissed the nationalist sources of this resistance as the fantasies of 19th century German revisionists, the battle for the liberation had nationalist undertones:

There is some truth to this view. A real rising did occur in Prussia. It was broad and deep enough to be called 'national', and closely connected with the ultimate victory over Napoleon and the European peace settlement in 1814-15, as well as with the rise of German nationalism later in the nineteenth century so closely connected, in fact, that one

cannot see how these developments could have come about without it (Schroeder 1994, 450).

Thomas Nipperdey agrees:

> It has been Napoleon's rule which [sic] had politicized the romanticized sense of nationhood and national consciousness of the Germans; it was experienced by many and for a long period as foreign rule, as oppression and exploitation, an attempt to impose uniformity on Europe. Resistance to Napoleon became patriotic resistance, and was based less and less on separate territorial platforms and on individual states, instead becoming a united German chorus. The years between 1806 and 1813 were the years that gave birth to the nationalist movement, first and foremost among the intellectual elite. The educated cosmopolitans of the late 18th century swung to nationalism in considerable numbers under pressure of outside events and experiences; the pro-Napoleon stance of Goethe or Hegel was atypical (Nipperdey 1996, 265).

Nipperdey also notes, "peoples who have no state or who are divided between states are those who seek to define themselves, first and foremost, according to language, culture and history, according to the Volksnation. This was the case with the Germans" (Nipperdey 1996, 265). The German people were more nationalistic because of their political disunion not in spite of it. If they had already formed a political system, they would not have been as susceptible to the claims of nationalism. H.W. Koch concurs that there was an upsurge in the spirit of German unity after the defeat of Napoleon:

> Many of the Prussian reformers and Germany's youth who had fought for the liberation of Germany from the Napoleonic yoke, and the urban and rural inhabitants of the states of the Confederation of the Rhine, desired a nationally unified German states based on unity and liberty, guaranteeing independence and security. Remembering what was thought to be the glory of the old Empire, they at the same time developed, or rather rediscovered, such a national consciousness as had not been witnessed in Germany since the Reformation and which had been buried since then under the sediments of foreign rule, intervention and particularism. (Koch 1984, 10).

In 1830, 1832, and 1840, the sudden fear of France rising again lead to nationalist outbursts that invoked the spirit of the Befreiungskriege (Wars of Liberation) or

Freiheitskriege (Wars of Freedom) from 1813-1815 (Taylor 1945, 56-57). Students in Frankfurt went so far as to declare the German Republic (Taylor 1945, 56).

The Germanic states of the region could have pressed for the opportunity to become part of some geopolitical security system that included non-Germanic peoples, but instead they agreed to form their own German security confederation. Even if they had pressed for inclusion in an ethnically mixed security organization, there were no palatable alternatives that included countries along their borders. Switzerland, Russian controlled Poland, Italy, Hungary, the Netherlands, and Belgium were culturally unthinkable as members of a predominantly German confederation.

According to Christian Jansen, a sense of nationhood emerged among the social and economic elite as early as 1740, but it was not until roughly 1800 that this sentiment sufficiently reached non-elites (Jansen 2011). The peoples that would become the German Empire in 1871 were, with the possible exception of Italy, the most homogenous European group—in the first half of the 19th Century—not to have formed a nation-state already.

Language

Language is another demographic element that can influence the federalization process toward centralization or decentralization. Diversity in language predisposes the moment toward decentralization, and uniformity in language at least does not prevent centralization.

Two types of linguistic diversity can engender institutional decentralization in a federation: linguistic minorities apart from the dominant language and geographically dispersed dialects of the main language. Linguistic minorities such as speakers of Danish, Polish, and French constituted only 7% of the population of Imperial Germany

(Smith:2011, 8). Even unitary states such as France and Spain contained linguistic minorities not far from this figure.

While the uniformity of spoken German should not be overestimated for the 19th Century, its increasing spread reduced the role that language could play in resisting political centralization. The chronological periodization of types of German evidences the use of a common German among the literate. Historians of the German language speak of Old High German (c.750-c.1050), Middle High German (c.1050-c.1350), Early New High German (c.1350-c.1700), and New High German (c.1700-1945) (Gloning 2004). Granted, these stages of German, even in their written forms, were not uniformly distributed across what would become modern Germany, but their degree of homogeneity was not dissimilar from that of France which would go on to form a unitary state. Stickel goes so far as to say that a "rather stable German linguistic territory was formed and existed" between the 14th and 20th Centuries (Stickel 2010, 121).

The homogenization of German occurred over several centuries. Martin Luther's printed Bible in the 16th Century moved the uniformity of both spoken and written German forward more quickly than at any other period (Sanders 2010, 117-151; Stickel, 2010, 121). The advancement of the Reformation and its prodigious literary output meant that High German displaced Low German in the North (Stickel 2010, 121), bringing additional uniformity. The decision by the Hapsburgs to use a hybrid form of Central and Upper German further contributed to uniformity (Stickel 2010, 121). 1617 saw the creation in Weimar of the Fruchtbringende Gesellschaft, one of the first purity-promoting German language societies (Jones 1999, 34). In the 1700s, more societies emerged for the promotion of German and its proper use (Stickel 2010, 121). During that same 18th Century, intellectual leaders such as Leibniz, Thomasius, and Wolff wrote in or

advocated for the use of German over Latin in written literature, philosophy, and other works of high culture (Stickel 2010, 121).

Uniformity in written form was achieved earlier than uniformity in spoken German for several reasons. The emergence of uniformity in written German before uniformity in spoken German meant that the literate reached a common spoken language sooner than the illiterate. While Latin remained the primary competitor to German as the language of print, by 1800 works in Latin constituted only 4% of the total (Bodeker 2005; Smith 2011}. Helmut Walser Smith indicates that Germany's often remarked low rates of literacy, at least in comparison with other European nations of the nineteenth century, need to be revised upward to 50% by the end of the eighteenth century(Smith 2011, 16). The spoken language may have only achieved spoken penetration to this level among the lower classes in 1800, but by the late eighteenth century the cultural, political, and economic elites were speaking a common German with each other. Strong and Kuno conclude that spoken German was uniform for all of the territories by roughly 1850:

When then the German language had once got a firm hold of the universities and schools throughout Germany, it ran no further risk of being dislodged in a country where instruction was so valued by the people of the nation. But the main factor in the production of the linguistic unity of Germany was the outburst of national literature which falls in the middle of the last century [i.e. 19th Century], and forms the most striking epoch in German national life (Strong 1886, 90).

When evaluating the disintegrative effect that local German dialects might have had in the 19th Century, it should also be kept in mind that such spoken differences persist today (Stickel:2010, 122), and these varieties do not prevent the unity of contemporary Germany. Both the linguistic and geographical divisions between High and Low German had developed considerably by this time. The differences within dialects of

High German had become smaller than the differences between the Germanic languages descended from Low German. Germans in Bavaria and Prussia felt more like brothers to each other and like cousins to their linguistic relatives living in Denmark, the Netherlands, and Belgium. Linguistic cohesion within Germany gained ground thanks to this "us" vs. "them" divide.

Eric Hobsbawm notes that the French language was not the universal idiom of France until well into the 19th Century:

> In this sense French was essential to the concept of France, even though in 1789 50% of Frenchmen did not speak it at all, only 12-13% spoke it correctly—and indeed outside a central region it was not usually habitually spoken even in the area of the *langue d'oui*, except in towns, and then not always in their suburbs. In northern and southern France virtually nobody talked French (Hobsbawm 1992, 60).

Unfortunately, suitable data for language demographics do not exist for periods preceding the Second Reich. Making this problem even more difficult, the Empire did not collect language statistics in its censuses until 1895. When the Reich did collect language data in 1895 it did so in a way that undercounted minorities. The first set of adequate data are from the 1900 census. Employing the fractionalization algorithm for these 1900 data generates a score of 0.15, placing Germany of 1900 between Australia and Libya in 2003. This score also places Germany near the bottom at the 12.4 percentile for 2003. Germany of 2003 scores a 0.095 and the 7th percentile.

Admittedly, several of these minority groups were clustered in particular states. The regions of Schleswig-Holstein (Danish, Friesian), West Prussia (Kassubisch), East Prussia (Lithuanian, Masurisch), and Posen (Polish) had districts with majority foreign language populations. Notwithstanding their concentrations in certain places, these language minorities did not have political clout. Those who spoke Polish or Lithuanian were part of the Prussian state and had minimal political clout. German speakers

outnumbered Danish speakers in Schleswig-Holstein, and the Prussians controlled the political system there since 1867. Danish speakers were roughly equal to German speakers in Schleswig but the Prussian government had amalgamated it with Holstein where Germans far outnumbered Danes (Carr 1963, 71).

According to Stephen Barbour, among the states that would become Germany ”none of the major candidates for the development of distinct linguistic, ethnic, and national status was sufficiently different from all of the others for this to happen” (Barbour 2000, 163). The German language was not strong enough to keep the Netherlands, Belgium, Switzerland, Luxembourg, and Austria together with Germany, but it did play a role in fostering unification for the German states.

Table 4.1 - Languages in Germany According to 1900 Census		
Language	**Number**	**Percentage of Total**
German	51883131	92.04
German Bilingual	252918	0.45
Polish	3086489	5.48
French	211679	0.38
Masurian	142049	0.25
Danish	141061	0.25
Lithuanian	106305	0.19
Kassubisch	100213	0.18
Wendisch	93032	0.17
Dutch	80361	0.14
Italian	65930	0.12
Moravian	64382	0.11
Czech	43016	0.08
Friesian	20677	0.04
English	20217	0.04
Walloon	11872	0.02
Russian	9617	0.02
Swedish	8998	0.02
Hungarian	8158	0.01
Spanish	2059	0.00
Portuguese	479	0.00
Other	14535	0.03
Total	56367178	100.00

Territorial Size

The North German Confederation and the German Empire may not have been small countries, but 1) they were much smaller than many federations with centralized judiciaries, and 2) they were smaller than a number of unitary countries.

Table 4.2 - Size of Germany in Comparison to both its Precursors and Large Federations with Centralized Judiciaries

Political System	Area Km2	Time Period
German Confederation	540,858	1815-1867
Zollverein	505,800.54	1854-May 1866 (Eve of Austro-Prussian War)
North German Confederation	430,403	1866-1871
German Empire	630,100	1871-1918
West Germany	248,577	1949-1990
East Germany	108,333	1949-1990
Kenya	580,367	1963-1970
South Africa	1,221,037	1994-Present
Sudan	2,505,813	1972-1983
India	3,287,263	1950-Present
Brazil	8,515,767	1834-1889
Canada	9,984,670	1867-Present
Russian Federation	17098246	1993-Present

We could compare the North German Confederation and the Empire to a number of unitary states, but the evidence is strongest from those states that formed within the nineteenth century.

Table 4.3 - Size of Germany Compared to Unitary States in the Nineteenth Century		
Political System	**Area Km2**	
German Confederation	540,858	1815-1867
Zollverein	505,800	1854-May 1866
North German Confederation	430,403	1866-1871
German Empire	630,100	1871-1918
West Germany	248,577	1949-1990
East Germany	108,333	1949-1990
Russian Empire	22,800,000	1721-1917
Chinese Empire	11,500,000	1880-1912
Peru	1,285,216	1884-Present
Bolivia	1,098,581	1884-Present
Chile	756,102	1884-Present
France	640,679	1792-Present
Paraguay	406,752	1811-Present

Economic Integration

Unusually for a moment of "coming together," when the North German Confederation formed, most of its constituent states had already been part of a customs union. Processes of "holding together" typically lack by definition limitations on internal trade. Some moments of "coming together" happen under the auspices of the end of a colonial period during which the metropolis enforces free trade among the political units that later form a federation. Germany fits within the smallest category of moments of "coming together" that have some preexisting economic integration, i.e., those that were not a colony.

When Bismarck could not convince the other members of the German Confederation to create a more centralized German Federation, he turned instead to unification through the reduction of trade barriers. The Zollverein was a customs union

among most of the members of the German Confederation. It was "the only large customs union between independent states which worked satisfactorily in the nineteenth century" (Henderson 1959).

Debate exists as to the custom union's role in effecting German unification, but the consensus view attributes at least some unifying effect to its creation, expansion, and long existence. Its creation meant further negotiation among the elites of the various German territories. Within the federal assembly of the German Confederation, representatives acted upon the instructions of their governments. The assembly functioned much like a gathering of ambassadors. The sovereigns did not have unmediated contact. With the Zollverein, the repeated and direct interactions between governments made the leadership of the German states more familiar with each other. As each additional German political unit joined the Zollverein, this familiarity increased. In addition, it made the elites of these territories more trusting of a process of unification. According to W.O. Henderson, historians of German unification should consider the Zollverein and its engineers as major contributors:

> My account of the Zollverein endeavored to show that the establishment of the customs union—and other economic developments—helped prepare the way for the subsequent political unification of Germany and that it would be a mistake to describe the founding of the Reich purely in terms of the diplomatic skill of Bismarck and the military achievements of Moltke. The statesman who made and developed the customs union—men like Motz, Pommer Esche and Delbrück—should also be numbered among the founders of the united Germany of 1871 (Henderson 1959).

According to Henderson economic integration experienced a secular increase:

> In transport, monetary affairs, commercial law and many other aspects of economic life the German States cooperated much more closely in the 1860s than they had in the 1830s" (Henderson 1959).

The creation of the European Union began with the unification of coal and energy policy, moved to trade and tariffs, and finally created complete executive, judicial, and legislative branches. More countries are part of the customs union than are part of the free movement of labor and persons. In the 19th Century, before the invention of the passport, the free movement of labor across state boundaries was the norm. Whereas the free movement of labor acted as a force for unification during the 19th Century, in the 20th and 21st Centuries the free moment of labor presupposes federal political institutions.

That which comes before is not necessarily the cause of that which comes after, but the EU process suggests that economic integration increases the likelihood of political unification. NAFTA would make it easier for Canada, the United States, and México to form a political federation. Oftentimes, as with the transformation of the Articles of Confederation into the United States, the enactment of free trade agreements happens simultaneous to the creation of political institutions, because the enforcement of the free trade cannot happen without them.

Religion

Imperial Germany was more religiously diverse than other states in Europe, but it was also more homogenous than a number of unitary and federative states that had centralized judiciaries. Helmut Walser Smith notes that, while the German Confederation contained roughly equal numbers of Protestants and Catholics, the German Empire was two-thirds Catholic. Estimates for France during the same period place the Protestant population at 2-3%. Whatever religious minority existed in Spain was not allowed to express its beliefs spiritually, let alone politically. H.W. Koch notes that politically "Catholics could be found who sympathized with the movement for German unity, epitomized by persons such as the publicist Joseph von Görres" (Koch 1984, 9).

CONCLUSION

This chapter has presented the process of German unification between 1866 and 1871 as a moment of "coming together" that created a federation with judicial decentralization. The constitutions of the North German Confederation and the German Empire permitted the federal government to significantly centralize aspects of the judicial system, but that increased concentration of power stopped short of creating a centralized judicial system. The constitutions allowed the central government to enact uniform national codes in both substantive and procedural law. Germany shared this arrangement with acted as the strongest element for

Central America has all of the elements that, taken together or separately, have been the organizing forces in countries like France, Germany, and Italy. The unity of territory, race, language, traditions, and political and economic relations make Central America one nation; only formal political unity is missing to make it definite and absolute.

—Edelberto Torres Rivas[23]

[T]hey apparently possess more bonds of similarity than any other small group of nations in the world.

—Thomas L. Karnes[24]

[23] {Torres:1985wh p. 10}
[24] {Karnes:1961wo p. 3}

Chapter Five - The Central American Federation

INTRODUCTION

This chapter describes the creation of the Federal Republic of Central America (CAF). It presents CAF's federal moment as evidence for a causal relationship between the preexisting institutions involved in "coming together" and the adoption of a decentralized judiciary. As with the other case study chapters, this one employs the comparative method. Both John Stuart Mill's Method of Difference (also called Most Similar Systems Design) and his Method of Similarity (also called Least Similar Systems Design) can use CAF as an example that supports this dissertation's thesis.

But CAF's example does more than function as a case study in this dissertation's use of the comparative method. Its characteristics make it a "crucial" or "difficult case." A "crucial" or "difficult case" exhibits characteristics that render it far less likely to fulfill the prediction of a given thesis (Gerring 2007; Eckstein 1975). If a theory holds true in that instance, it increases the probability of that theory's validity. Of all the "coming together" federations, CAF's relatively homogenous structural profile made it one of the least likely federations to adopt judicial decentralization. In this way, CAF resembles one of the other case studies, the German Empire (1871-1918). And just as the "coming together" nature of Germany's federal moment (1866-1871) furnished Germany with a decentralized judiciary, the "coming together" nature of CAF's birth furnished it with a decentralized judiciary. In this way, CAF's experience provides greater support for this dissertation's argument than do the experiences of many of the other "coming together" federations that adopted decentralized judicial systems.

Using the Comparative Method to Explain the Adoption of Judicial Federalism by the Central American Federation

Making Use of CAF in a Most Similar Systems Design

The Most Similar Systems Design of the comparative method controls for other potential causes of the dependent variable by holding them constant. It holds them constant by choosing cases that share those characteristics. In this way, it makes it possible to rule them out as the cause of the dependent variable. MSSD collects a set of cases that differ with respect to only one independent variable. One set of structurally similar cases, for instance, becomes two sets of institutionally dissimilar cases. Because only one independent factor differs among the cases, Mill calls Most Similar Systems Design the "Method of Difference." Ideally, MSSD includes two large and equally sized sets that differ only with respect to that one factor.

In order to suss out evidence that supports this dissertation's theory, a Most Similar Systems Design (MSSD) will make use of CAF's structural similarities to recent Spanish American "holding together" federations: Uruguay (1942), Colombia (1992), Paraguay (1993), Venezuela (1994), Peru (1980), Bolivia (2009), and Chile (2019). In contrast to CAF, they all retained their unitary judiciaries. As former colonies within the same region of the Spanish Empire, they manifested economic, linguistic, and cultural profiles similar to CAF's. But unlike those other former colonies, CAF did not emerge from a unitary state. It did not become a federation in an attempt to prevent its unitary state from fracturing into several separate countries. Nor did it emerge from a unitary state that was choosing to decentralize for some other reason, such as improving governmental efficiency or accountability.

A different set of countries manifested considerable similarities to CAF and, also like CAF, formed as "coming together" federations: Venezuela (1811), Mexico (1824), Colombia (1832), Peru-Bolivia (1836), and Argentina (1860). Like CAF, each one adopted a decentralized judiciary. In contrast to the comparisons between CAF and the countries mentioned in the preceding paragraph, comparisons between CAF and these countries do not independently help us determine the cause of CAF's decentralized judiciary. Merely comparing them to CAF only reveals the over-determination of the dependent variable, i.e., having a decentralized judiciary. The structural characteristics of these other countries make them structurally indistinguishable from CAF. And the "coming together" nature of the institutions involved in their federal moments makes their federal moment's institutionally indistinguishable from CAF's.

Comparing their federal moments with CAF's does not independently provide evidence regarding the cause of decentralized judiciaries, but it can help in another way. By expanding the set of federal moments to include the ones mentioned above, i.e., those federal moments that exhibit structural but not institutional similarities to CAF's federal moment, we can make use of those federal moments that exhibited both structural and institutional similarities to CAF's federal moment. All eleven countries have meaningfully similar structural characteristics, and yet the institutional characteristics of their federal moments split them into two groups. And the contrast, between six countries that follow one route and seven countries that follow another route, provides better evidence than a comparison between one country (i.e., CAF) and seven countries. Instead of having just one example of a country (i.e., CAF) whose "coming together" federal moment gave it a decentralized judiciary, we now have six.

Comparing these two sets of federal moments to each other provides evidence for the claim that "coming together" federal moments involve a set of preexisting institutions that differ from those of "holding together" federal moments. The institutional divergence between them emerges as the Millian "difference" that gives them their two different trajectories. "Coming together" institutions lead the process down the path to the incorporation of a decentralized judiciary, and "holding together" institutions lead the process down the path to the incorporation of a centralized judiciary. The Most Similar Systems Design does not constitute the only way to use the comparative method to provide evidence for the theory, but rather, the Least Similar Systems Design of the comparative method can also provide evidence.

Making Use of CAF in a Least Similar Systems Design

The comparative method's Least Similar Systems Design (LSSD) can help us rule out many of the independent variables that make up the universe of causes alternative to our theorized one. LSSD varies the independent variables as much as possible by choosing cases that manifest many different characteristics. In this way, we can eliminate them from our list of things that may have caused the dependent variable. If two different cases manifest the same independent variable, for instance, but also manifest divergence with respect to the dependent variable, then the analysis can reject that independent variable as a potential cause of the dependent variable. In order to find at least two cases that perform this function, LSSD collects a set of cases that differ with respect to many independent variables. Each time that the same independent characteristic varies, even though the dependent characteristic does not vary, we can set aside that independent characteristic as a potential cause of the dependent characteristic. One set of cases that

varies in a seemingly infinite number of independent variables, in other words, reduces to two sets of cases that vary with respect to only one independent variable.

The dependent variable has two mutually exclusive outcomes, i.e., "positive" or "negative," i.e., the presence or absence of judicial federalism. The independent factor that we theorize to be the genuine cause, i.e., preexisting institutional arrangement "A" or preexisting institutional arrangement "B," varies in concert with that dependent variable, i.e., the presence or absence of judicial federalism. Because only those cases that have the "similarity" of exhibiting institutional arrangement "A" for the independent variable simultaneously exhibit "positive" for the independent variable factor, Mill called the Least Similar Systems Design the "Method of Similarity." Ideally, LSSD includes a large set of cases that differ with respect to numerous characteristics (potential independent variables), any one of which might be the genuine cause of the variation observed in the dependent variable.

The Least Similar Systems Design in this chapter compares CAF to those "coming together" federations whose characteristics differ from CAF's most starkly. But LSSD inherently involves a crucial limitation. Ideally, LSSD enlists a large number of comparisons. Otherwise, it cannot serve as a way to eliminate the other independent variables as factors that might explain for the variation in the dependent variable better than the independent variable that we have theorized as the true cause. LSSD must certainly enlist more cases than does the MSSD. A comparison between just two cases as part of an LSSD cannot isolate the Millian "similarity" it needs to identify. MSSD, on the other hand, may only need as few as two observations because those two cases manifest few if any differences between them with respect to any potential alternative independent variables. But cases in an LSSD differ in numerous respects.

Let us posit, for instance, two cases that differ with respect to the dependent variable, e.g., centralized vs. decentralized judicial institutions. Suppose that they also differ with respect to more than one potential independent variable that looks like a plausible alternative to our theorized causal independent variable. These two cases differ in their "structural diversity" and their "type of federal moment." The pairing of those cases cannot provide evidence for attributing the outcome of judicial centralization to either "structural diversity" or "type of federal moment." It cannot distinguish between the two different plausible causes.

Chapter Two presented the main argument of this dissertation and surveyed more than sixty cases supporting that argument. Because that chapter, in effect, made use of the Least Similar Systems Design both thoroughly and quantitatively, it suffices here to compare CAF's federal moment with no more than a few other countries' federal moments. In terms of territorial size, among the other "coming together" federations, the much larger USSR dwarfs CAF, and CAF dwarfs the much smaller Micronesia. Comparing their territorial sizes with CAF's yields two of the strongest contrasts between the characteristics of any two federations. With respect to linguistic, cultural, and ethnic diversity, meanwhile, CAF both defeats Australia and loses to Somalia, by large margins. Yet in all five instances, "coming together" led to judicial decentralization. The institutional frameworks inherent to "coming together" emerge as the Millian "similarity" that makes each federation in this variegated group choose judicial decentralization.

Pairing the Most and Least Similar Systems Designs

Making use of both MSSD and LSSD in the comparative analysis of some political phenomenon always improves upon using either of them alone. Sometimes an

LSSD or an MSSD sufficiently demonstrates cause and effect. But, even in those situations, the addition of the other method, adds further proof for the theory that the analysis has posited. A comparativist need not choose between the Most and Least Similar Systems Designs. Many times, however, the particular range and type of variation—in the characteristics of the observations available to us by dint of the contingency inherent to reality—renders one or the other design insufficiently explanatory. But, sometimes LSSD and MSSD can ameliorate each other's deficiencies.

Neither method produces definitive evidence. Least Similar Systems Design cannot remove the possibility that some other unidentified factor bears responsibility for the dependent variable. Two unrelated independent variables may correlate with both each other and the dependent variation, even after we have collected a large number of cases. In this situation, the available cases do not exhibit enough *difference* from each other for the purposes of demonstrating an explanation. The limited nature of the universe of real world cases could make it impossible to choose accurately from among various plausible causes. But that does not mean that an LSSD involving three or more cases does not eliminate any of those plausible causes.

Most Similar Systems Designs can also produce inconclusive results. The similarities between the two most similar political systems might not eliminate a sufficient number of the potential causes. The universe of cases may not contain two sufficiently similar countries. In this situation, the available cases do not exhibit enough *similarity* to each other. But, just as with LSSD, the absence of "perfectly usable" cases does not mean that an MSSD involving just two cases does not eliminate any of the alternative plausible causes. In both Least and Most Similar Systems Designs, cogent evidence could remain elusive because the available cases do not manifest the necessary

kinds or amounts of similarity or difference. Separately, each method gets us at least a little closer to an accurate explanation. Combining the two approaches provides a way to increase both the amount and the strength of the evidence.

The Crucial Case Method

But even the combination of these two methods does not exhaust how an argument about causality can make use of CAF's example. Another way to marshal evidence for a theory of causality involves the "crucial" case design (CCD), otherwise called the "difficult case" method. If the least probable case follows the posited theory, then the theory becomes more persuasive. If it can happen there, it can happen anywhere. If it cannot happen there, it cannot happen anywhere. But, in order to use Central American Federation in a CCD, we must first demonstrate that its characteristics make it a "crucial case."

Case Selection: Structurally Homogenous Compared to What?

CAF serves as a better "difficult" or "crucial case" than any other cases. Those alternative cases include the United States (1789), Micronesia (1979), the West Indies Federation (1958), Malaysia (1957), Switzerland (1848), ZSFSR (1920), the UAE (1971), the Federal Republic of Yugoslavia (1992), and Iraq-Kurdistan (2003). Even though it only existed for less than two decades, from 1823 to 1841, the short-lived Central American Federation (*Federación de Centroamérica*) exemplified a relatively small and structurally homogenous territory whose "coming together" federal moment nevertheless generated a decentralized judiciary. In addition to serving this dissertation's use of the comparative method, Central America can also serve the method of the "crucial" or "most difficult" case.

Micronesia (1979) counts as a moment of "coming together" because each of its four governments had the option to become independent from the others in the process of achieving self-rule from the United States. According to an agreement with the United Nations, the United States held trusteeship of Micronesia and six other island systems from 1947 until 1979. This collective arrangement called the Trust Territory of the Pacific Islands (TTPI). Three of the TTPI's seven members (the Marshall Islands, the Northern Mariana Islands, and Palau) did in fact choose to form their own separate countries. The Northern Marianas left in 1975, four years before the TTPI would end for the other islands. The four states (Yap, Chuuk, Pohnpei and Kosrae) that combined into the Federated States of Micronesia constituted the remaining states of the TTPI. Micronesia consists of four geographically concentrated ethnic and language groups.

The Federation admittedly manifested greater structural diversity than most unitary states, both quantitatively and qualitatively. But within the universe of past and present federations, the United Provinces of Central America (*Provincias Unidas del Centro de América*) exhibited one of the most uniform structural profiles. The few other "coming together" federations that display significant structural homogeneity, moreover, do not resemble linguistically, economically, or ethnically monolithic countries. They include the United States (1787), Denmark-Schleswig-Holstein (1855), the Confederate States of America (1860), Micronesia (1985), and the UAE (1971). As with these other "coming together" federations, therefore, the Federation of Central America had some disintegrative characteristics. But CAF contained fewer structural sources of fragmentation than did those alternative cases.

Properly assessing the evidence for CAF's structural heterogeneousness requires two types of comparisons; it means comparing CAF's putative homogeneity with the

homogeneity not only of "holding together" federations but also unitary political systems. The collection of countries that constituted the Central American Federation may not have possessed less structural diversity than the average unitary state. But the Central American region had greater structural homogeneity than many unitary states, such as Kazakhstan, Liberia, and Papua New Guinea. Granted, some of those unitary states, including France, Spain, and South Africa eventually became "holding together" federations. Or they had existed as federations in the past.

But Central America also exhibited less structural heterogeneity than did some unitary states that have never experienced federalism. Those unitary states most likely avoided "holding together" federal moments by dint of their low levels of structural heterogeneity. In addition to including Kazakhstan, Liberia, and Papua New Guinea, this group also contains political systems such as Saudi Arabia, Zambia, and Madagascar. By comparing CAF not only with other federations but also with unitary systems, we have more than adequate justification for using CAF as a "difficult case." CAF constituted one of the most likely candidates where low structural diversity plausibly could prevent "coming together" from fostering judicial decentralization.

The Benefit of Using LSSD, MSSD, and CCD to Support the Same Theory

If the universe of cases makes it possible, it behooves the social scientist to employ all three methodologies: LSSD, MSSD, and CCD. The combination of all three methods makes an even stronger case for the theory by combining all of their evidence. Otherwise, the argument on behalf of the theorized explanation makes inadequate use of the available evidence.

A Prefatory Note on Nomenclature

When speaking of Central America more broadly, the chapter uses the acronym CA. In almost every case this will mean the territories covered by present day Guatemala, El Salvador, Honduras, Nicaragua, and Costa Rica. When referring to the present, CA includes Panamá but not Chiapas. When referring to the period immediately after independence, roughly 1821-1824, CA includes Chiapas but not Panamá. The region of Central America (CA) should not be confused with the political system that was the Central American Federation (CAF)

For various reasons, the region's political system had more than one name. Because both primary and secondary sources reflect this variation, the discrepancies merit some clarification. In 1824, the Federation's creators changed its official title from the United Provinces of Central America (*Las Provincias Unidas del Centro de América*) to the Federal Republic of Central America (*La República Federal de Centroamérica*). They rechristened it when they made permanent the country's otherwise unaltered provisional constitution. Not all Central American citizens noticed the change or used the new name. Some called it the Federated States of the Center of America (*Estados Federados del Centro de América*).

Many of the Federation's denizens used these names interchangeably. Because "Central American Federation" (*Federación de Centroamérica*) never became one of the political system's formal titles, I use it when referring to either period. This chapter leaves untouched the variations in naming found in primary or secondary sources. Whenever it becomes necessary to distinguish between the separate periods of the United Provinces of Central America and the Federal Republic of Central America, this chapter

will differentiate them. But for the sake of simplicity and clarity, the remainder of this chapter speaks of the Central American Federation (CAF).

The Structure of this Chapter

In order to demonstrate how Central America's experience supports the contention—that even structurally homogenous "coming together" federations adopt decentralized judiciaries—this chapter proceeds in the following way. First, it presents a detailed account of the dependent variable, i.e., the institutions of the Federation's judiciary. Second, this case study of the Central American Federation traces the process through which the leaders of the countries of Central America selected institutions for the federation. The narrative begins slightly before independence in 1821, continuing through the region's annexation to the Empire of México. It then presents an account of the negotiations at the constituent assembly of 1824 and examines the constitution that emerged from it.

Third, this chapter outlines the evolution of colonial Central America's various administrative, territorial, and geographic arrangements. The description begins at the period of conquest, continues through the Bourbon Reforms of the later half of the eighteenth century, and ends with the institutional situation immediately after Central America's separation from the Empire of México in 1822. In this way, the chapter illustrates how the institutions present at the founding of the federation, rather than any previous arrangements, decided the nature of CAF's judiciary. This section compares the influence of all of those previous institutional arrangements with the influence of the institutional arrangements at the moment of federating. While the previous institutions

had little to no effect on the institutional arrangements of CAF, the arrangements that existed on the eve of Central America's federal moment had significant effects.

Fourth and finally, the chapter illustrates that Central America exhibited structural homogeneity. Rather than beg the question of CAF's relative homogeneity, the chapter thickens its presentation of the qualitative evidence for it. Economically, demographically, and geographically, the countries within the Central American Federation had enough uniformity among them to have formed one unitary country. In fact, this chapter's first section, on the region's organizational evolution, presents evidence for this claim when it describes several periods during which multiple parts or even the entire region functioned as unitary political entities. During the Spanish Empire's decentralized but not federalized *Reino de Guatemala* (Kingdom of Guatemala), the Central American colonies operated under a unitary colonial bureaucracy.

PART ONE: THE JUDICIAL INSTITUTIONS OF THE CENTRAL AMERICAN FEDERATION

Compared to the judicial sections of many other constitutions, Title VIII of the 1824 Constitution says relatively little about the arrangement of the Federation's judiciary. This is likely, at least in part, because of the system's significant decentralization. The founders may not have expected the judiciary to solve conflicts between and among the states and the Federation, either because they did not expect many conflicts or because they expected the executive and legislative branches to resolve them. Or they could have simply overestimated their federal judiciary's ability to deal with those conflicts. CAF's 1824 Constitution adds further evidence to the observation

that the national judicial sections of "coming together" federal constitutions have fewer details than the national judicial sections of "holding together" federal constitutions.

The Constitution does mention judicial qualifications but does not specific any protections. Federal judges had no salary guarantees; the Constitution entrusted the legislature to set those amounts, and nothing indicates that it could not reduce judicial salaries in addition to increasing them (Article 69, Section 28). Judges of the Supreme Court needed to be natural born of the Americas, maintained both residency and citizenship in one of the Central American provinces for at least seven consecutive years, and not forfeited the exercise of their rights by committing some crime. They could not be clerics and had to be at least thirty years old. All of these conditions had to be met right up to the moment of the election. Even if a candidate met all of those criteria (naturally born in the Americas, a citizen and resident with full political and civil rights for seven consecutive year) but then lived abroad long enough to establish residency somewhere else, he would have to begin meeting the seven year requirement again.

According to the Constitution, the Supreme Court of the Nation consisted of five, six, or seven judges; a federal law would specify the exact size (Article 132). The judges are to be elected (*elegidos*) by the people (*por el pueblo*). A third of the court is up for election every two years, with no limitation on reelection. Morales Baños criticizes this as yet another stupid mistake in the 1824 Constitution Morales Banos 1985). For him, it is not clear how the numbers five or seven can be split into thirds, and this apparent mistake mirrors one made for the Senate, where a third of the ten Senators is up for reelection every two years.

But thirds (*tercios*) could mean something different in this context; perhaps in the case of an odd number of judges, thirds meant dividing the total into three groups, even if

one of those groups would not be equal to the others in size. In the United States, for instance, two groups of thirty three and one group of thirty four make up the three groups of the Senate. The fact, that the *Constituyente* both chose a range from five to seven and prescribed the renewal of a third of those judges every two years, suggests that, while the founders expected there to be six judges on the Supreme Court, they wanted the ability to moderately increase and decrease the size of the Court

Because the Constitution prescribed indirect popular election as the mechanism for selecting the judges of the federal Supreme Court, we need to take at look at CAF's overall electoral scheme (Title III). The phrase "elected by the people" had initially contained the modifier "directly," but Filadelfo Benavente[25] and others had it struck out of the final document (Montiel Arguello 2005, 158). The federal government would divide the country into three levels by population (Article 23): departments into districts and districts into local councils (*juntas populares*). The local councils of 250 to 2500 inhabitants would send one elector to the district council for every 250 inhabitants (Article 33-34). A remainder of 126 or more inhabitants would give the local council one more elector to send to the district council (Article 35). Two thirds of the district electors chosen by the local councils had to be present, if the selection of the representatives to the departmental council was to take place (Article 36). By simple majority vote, a district council would select one representative to send to the departmental council for every ten district electors, including those not present (Article 37). A departmental council consisted of twelve electors for every congressional representative that it was going to name (Article 38), but the elections for the Supreme Court at each level had to

[25] Alternately spelled "Benavent" and "Benavente."

be totally separate from the elections for the federal legislature and executive (Article 42). Each Court seat up for election would have its own ballots.

In reality the election of a judge to the Supreme Court was indirect, at least formally, by only one degree. Congress would get involved only if no candidate achieved a simple majority of the *district level* votes for a seat on the Court (Article 47). In other words, the electoral process made us of the number of votes at the departmental level in order to organize the size of the electorates at the district level, but the number of departmental votes did not count in the actual election. So long as one candidate achieved a majority, then only two electoral levels existed, i.e., the local and the district.

The government could remove judges of the Supreme Court. First the Congress would have to decide whether to bring charges (Article 150), presumably by a supermajority of two thirds of those present (Article 69, Section 27). If Congress decided to "indict" a judge, the Senate would choose a tribunal of five people, chosen from among the alternate Senators and Representatives. But only alternates that had not assumed a seat in the Senate or Congress, respectively, could serve on the tribunal. The Constitution does not specify the meaning of "that have not entered the exercise of their functions" ("*que no hayan entrado al exercicio de sus funciones*") means (Article 147). Perhaps an alternate Senator or Representative could serve on the tribunal, even though they had substituted for full Senator or Representative, because that alternate had returned to the status of being an alternate when the full Senator or Representative returned to his duties.

According to the Constitution, the Federal Congress also had the power to create inferior federal courts (Article 69, Section 25) that would try issues specific to the federation ("*que conozcan en asuntos propios de la Federación"*). The Supreme Court

would nominate three names for every open seat on an inferior federal court, from which the President would choose someone to appoint (Article 117). The Constitution does not say what will happen if the President expressly rejects of all three names, or if he simply ignores the nominations entirely, leaving a continued vacancy on the Supreme Court. The Senate played no role in these lower court appointments. Nothing prevented the federal court system from including both first instance district level courts and second instance appellate level courts. The Supreme Court had both the power and the obligation to watch over the conduct of inferior court judges, and to see to it that those courts and judges resolve cases promptly and in conformity to justice (Article 140). Judges could not simultaneously serve at more than one level in the judicial hierarchy (Article 173). Interestingly, nothing in the Constitution specifies a mechanism for removing inferior court judges.

Some disagreement took place regarding the creation of additional federal courts to deal with certain controversies involving the Federation and its laws. According to deputy Benavente, Article 25, which permitted the federal government to create such courts, contradicted Article 137 that required a mechanism of ad hoc arbitration (Montiel Arguello 2005, 152). That Article 137 system, creating a specific court for each particular controversy, looked similar to the mechanism adopted by the American Articles of Confederation to settle disputes between members of the Confederation. Benavente clearly preferred the absence of any permanent central court. That feature made CAF's judiciary less centralized, but the absence of such a permanent court played a significant role in undoing the AOC. The delegates to the National Congress of the AOC, in fact, never used the arbitration mechanism of the AOC because it proved unworkable.

Those students of comparative constitutionalism, who contend that many Latin American countries simply adopted the U.S. Constitution without modifying it in accordance to their local circumstances, will see that CAF does not fall under that generalization. Many differences between CAF's Supreme Court and that of the United States have already been mentioned, but the scope of original and appellate jurisdiction manifests some particularly interesting contrasts. According to Article 136, the Supreme Court served as the ultimate appellate court in all cases that involved the interpretation of the Constitution, general federal laws, international treaties, maritime law, and disputes between citizens from two or more different states of the Federation. This mirrors the US Supreme Court in most respects. But there the similarities end.

A significant difference between the US and CAF Supreme Courts emerges when we take a look several other sets of cases (Article 137). A different system applied to controversies between the Federation and one or more states, between two or more states, between foreigners and the Federation or a state, and between inhabitants of the Federation and foreigners. This list also included cases in which a citizen sued his own state. In other words, a citizen could not sue his own state in its very own courts, but a he could sue his state government federally. In all of the aforementioned situations, the CAF Supreme Court would select ad hoc arbiters particular to the specific controversy. The arbiters served as the "first instance" trial court. The Supreme Court had to review those decisions as a court of second instance, if one of the parties objected to the decision. If one of the parties objects to the Supreme Court's second instance review, the 1824 Constitution requires the Senate to review the controversy as a court of last instance.

In the process of setting a ceiling and floor for the political institutions of the states, Title XII of the Constitution of 1824 increases the centralization of the judicial

power. The Constitution prescribes that each state must have a highest court and, therefore, implies that each state must have a judicial branch separated from the executive and legislative branches (Title XII, Section 4). The judges of each state's high court must obtain their seats through popular election, and frequent regular judicial elections must take place (Article 189). The state high court must be the court of final review. In other words, in order to further maintain a separate the judiciary's decisions from the encroachments of the executive and legislative branches, no one could appeal or review the decisions of the state's highest court (Article 190). Finally, and perhaps most importantly, federal law would set the rules according to which the state could judge and remove any of its legislators, executive officials, and judges (Article 191). The state could write the specifics of the procedure, but they could not violate the requirements that the federal law would set. The Constitution of 1824 contained a "full faith and credit" clause (Article 193) and an "extradition clause (Article 192).

Rather than expect a plaintiff state to sue a defendant state in federal court when the plaintiff state believes that the defendant state has overstepped its constitutional powers and encroached on plaintiff state's powers, the Constitution of 1824 demanded that the Federal Senate refer the controversy to two of the Federation's other states for a negotiated resolution (Article 194). Failing an agreement, the Congress would decide the matter permanently. It is not clear how this mechanism does not contradicted Article 137 that required a mechanism of ad hoc arbitration (Montiel Arguello 2005, 152). The Constitution may be making a distinction between controversies between states that involve constitutional issues (e.g., if a state can ban certain imports from another state), on the one hand, and controversies between states that do not involve constitutional

issues (e.g., a suit by one state against another for polluting a lake that connects them), on the other.

Relative to other issues, the *Constituyente* had few discussions regarding the judicial power, but one particular speech crystallizes the issues at stake for the provinces. On May 26, 1824, deputy Benavent from Nicaragua defended his province's creation of a court of "second instance" with jurisdiction to hear all of the appeals from the lower courts in the province (Asamblea Nacional 1824;Montiel Arguello 2005, 112). According to Benavent, Nicaragua had erected this appellate court without getting permission from or consulting with Spain, between 1809 and 1820, or México, between 1820 and 1822. The deputy argued that the Constituyente had agreed to leave all preexisting institutions undisturbed, including those established during the period of "absolute" independence between the provinces. Benavent contended that the Province of Nicaragua had already, in fact, "tacitly" approved the continued existence of the Nicaraguan Appellate Court; for, none of the deputies from Nicaragua had challenged its creation. Benavent said that he was speaking on the issue because a deputy from another province had called for the dismantlement of the appellate court.

PART TWO: TRACING THE PROCESS THAT CREATED THE FEDERATION OF CENTRAL AMERICA

This section details the process through which Central America went in order to become the Central American Federation. It includes a description of the moments that lead the region away from alternatives, such as remaining part of the Spanish Empire, annexation to Mexico, and permanently dissolving into multiple independent countries, and toward the creation of a federation. The analysis emphasizes the role that preexisting institutions played in limiting the influence that human agency could play. Conservative

Central American political leaders could not persuade the constitutional convention to adopt a centralized judicial system for the Federation. Various particular interests located in each of the provinces refused to capitulate their recently gained control over their judicial systems, even though they willingly transferred many of their other powers to the central government.

Napoleon's Invasion of Spain as the Cause of Central America's Independence

The Central American Federation formed from the cities, villages, and provinces that had once constituted the Kingdom of Guatemala (*Reino de Guatemala*), i.e., the Spanish Empire's colonies and territorial holdings in Central America. Napoleon plays a central role, then, in two of this dissertation's case studies: the German Empire and the Central American Federation. And in both examples, a moment of "coming together" gave birth to a federation with judicial federalism.

In effect, Napoleon's victory at Austerlitz caused the German Empire of 1871 by triggering the process of German political unification. He achieved the *de facto* dissolution of the Holy Roman Empire and stimulated nationalist German sentiment by occupying Germanic free cities, principalities, and kingdoms with his nationalist French army. By forcibly collecting them into his Confederation of the Rhine, Napoleon gave the populations of many Germanic states a taste of what unification would be like. Napoleon's military exploits in Europe likewise started the chain of events that led to Central American independence and, therefore, to the creation of the Central American Federation. In 1807, Napoleon deposed both Charles IV and Ferdinand VII in Spain, putting his brother Joseph in their place as the new King of Spain. When the news

reached Spanish America, the central authorities of the Guatemalan Kingdom proclaimed their allegiance to both the King and Spain.

The system of representation in the Cortes influenced how Central America allotted representation in its Constituyente. Formally, the Constituyente simply copied the electoral mechanism that the Cortes had prescribed. During the several Cortes that took place between 1808 and 1821, the disproportionality of representation favored Spain and disfavored the Americas. Representation became somewhat less malapportioned by the time that Central American cities began declaring independence from Spain, but

In 1808, once they had news of the establishment of the Cortes, the authorities in the Kingdom of Guatemala asked the emergency Cortes in Cádiz for permission to send delegates to the process that would set policy for the entire Spanish Empire. The initial "Extraordinary Cortes" that began in 1808 had by 1809 announced that Spanish America no longer constituted a colony. On January 22, 1809 (Junta Central 1809), the Cortes invited the American colonies to participate in its sessions.

Putatively, all of Spain's colonies now held the same status as Spain with respect to both the monarchy and the empire, but the colonies' share of representation in the Cortes belied that claim. While Spain gave itself thirty nine deputies in the Cortes, it entitled the rest of the Empire to only nine representatives (Avendaño Rojas 2009, 89). Estimates indicate that, while Spain had a population of ten million in 1809, Spanish America had a population of thirteen and a half million (Sánchez Alborñoz 1984, 34). The Philippines had roughly one million eight hundred thousand inhabitants.

Table 5.1 — Population per Delegate (circa 1800) of those Regions in the Spanish Empire that were Permitted to Participate in the Cortes de Cádiz (1809)

Region of the Spanish Empire	Population	Delgates	Population per Delegate
Spain	10,541,000	39	270,282
New Spain/Nueva España	5,945,000	1	5,945,000
New Granada/Nueva Granada	2,300,000	1	2,300,000
Río de la Plata	2,082,000	1	2,082,000
Philippines	1,800,000	1	1,800,000
Perú	1,400,000	1	1,400,000
Chile	800,000	1	800,000
Guatemala	425,000	1	425,000
Cuba	300,000	1	300,000
Puerto Rico	136,000	1	136,000
Total	25,729,000	48	514,794

Each *virreinato* and *capitanía* would have one diputado representing it at the Cortes. Hence the Reino had representation directly, through its own diputado, and indirectly, through the representative from the Virreinato de Nueva España, of which the Reino constituted a part (Laguardia 1991, 369). By May 30, 1809, Guatemala had selected Don Manuel Pavón to represent it at the Cortes, but ultimately he never left to take his post. When the regency replaced the Junta Central, new elections to the Cortes became necessary. Therefore, according to the same electoral rules by which Guatemala had selected Pavón, Guatemala elected Antonio Larrázabal y Arrillivaga on June 24, 1810, but even he did not arrive at the Cortes until September, 1811.

By the end of its first session, the Cortes expanded the representation of the Reino. The new election law issued in 1809 now entitled the *Capitanía de Guatemala* to 12 diputados at the 1810 Cortes in Spain (Avendaño Rojas 2009, 100), one propietario and one suplente each for Guatemala, San Salvador, Honduras, Nicaragua, Chiapas, and

Costa Rica. But those representatives still had to travel across the Atlantic. In the meantime, to mollify Central America by providing it with at least virtual representation at the meetings in Spain, the Cortes selected thirty natives of Central America resident in Spain (LaGuardia 1991, 372-373). In the Cortes on behalf of the Reino, these *suplentes* could speak but not vote. Equality of representation from the provinces of the Reino at the 1810 Cortes set a precedent, albeit a weak one, for equal representation in the Federation. The precedent weakened because the Spanish government altered the system of representation in the Cortes to make it more proportional to the differences in population size among the provinces of the Reino.

Table 5.2 — Population per Delegate of Central American Representation in the Cortes de Cádiz 1812

Province	Population (circa 1800)	Diputados	Population per Delegate
Guatemala	412835	6	
Honduras		4	
Nicaragua		3	
Chiapas		2	
El Salvador		2	
Costa Rica		1	
Reino de Guatemala		18	

Table 5.3 — Population per Delegate of Central American Representation in the Império de México

Province	Population	Diputados	Diputados per capita
Guatemala	412835	15	
Honduras		8	
Nicaragua		8	
Chiapas		9	
El Salvador		2	
Costa Rica		2	
Reino de Guatemala		45	
Source: {AvendanoRojas:2009ve p. 117}			

Discontent with Spain manifested itself as outright violence to a lesser degree in the Kingdom than it did in other parts of Spain's colonies. In other provinces and cities of Spanish America, local juntas formed, overthrew the local colonial leadership, and declared independence from Spain. Many of these juntas swore their allegiance to King Ferdinand VII, while others accepted the authority of the Cortes in Cádiz. The Kingdom of Guatemala never reached that degree of disintegration during this period between the Napoleonic invasion and the restoration of the Spanish monarchy in 1814. Some relatively mild revolts did take place in the *Reino*, but none of them gave rise to any *juntas* that endured for more than a few months, whereas some of the *juntas* in the other colonies such as Venezuela, New Granada, and New Spain lasted for more than a year.

The insurrections that did occur likely took place in opposition to the rule of Guatemala City rather than in favor of full-scale independence. Most of the insurrections took place outside the province of Guatemala. All of the other provinces were tired of the governance of Guatemala City over the entire Kingdom. The elite of the capital may not have had direct control over the decisions made by the royal government, but they did have more indirect influence than elites in the other provinces. The elites in Nicaragua, El

Salvador, Costa Rica, and Honduras also resented Spain's mercantilist economic system and the fact that Guatemala was either the least disadvantaged provinces by that scheme or actually benefitted from it.

The revolts started at the level of the city rather than at the level of the province. Diffusion of insurrection took place, but it was never certain that revolt in one city would lead to insurrection in its neighboring towns. Even in those cases where the rebellion toppled the leadership of the provincial intendancy, it did not mean that the rest of the cities and towns in the province would follow suite. One brief revolt in San Salvador—led by Manuel José Arce and Juan Manuel Rodríguez, with the help of two priests named José Matías Delgado and Nicholás Aguilar—took place in November of 1811. Unfortunately for the revolutionaries, the other major cities of El Salvador, such as Sonsonante, San Miguel, and Santa Ana—remained faithful to the royal government. Rebellion took place in Nicaragua at least in part because of the misrule of the *intendente* José Salvador, but no *juntas* in other cities came anywhere close to Granada's five months of independence. Revolts also took place in Tegucigalpa (1812), Belén (1813), and San Salvador (1814).

The Cortes in Cádiz did not improve the relationship between the Kingdom of Guatemala and Spain. The members of the Cortes were Spaniards first. They did not want an independent Spanish America, and they intended to take the necessary steps to prevent it. Even though delegates from the Spanish American colonies participated in the Cortes, the Constitution did not put the colonies on a level equal to that of Spain. The Spanish American delegates had envisioned a federation in which Spain would only be one part. In 1811, the Cortes also took the step of transferring a new Captain General and Governor, José de Bustamante y Guerra, to the Kingdom of Guatemala (Hawkins 2004;

Karnes 1961, 13-15). The 1812 Cadíz Constitution may not have transformed the Empire into a federation, but otherwise it liberalized government for the colonies. As a conservative, Bustamante would have nothing to do with liberalism, and he proceeded to centralize government and crush the rebellions without mercy (Karnes 1961, 13). A more seasoned and less extreme Captain General, Carlos Urritia y Montoya, replaced Bustamante in 1818 (Karnes 1961, 16). He reinstituted many of the liberal reforms, rights, and privileges that Bustamante had revoked (Karnes 1961, 16). In 1821 for the first time elections for local offices took place (Karnes 1961, 17).

The provinces of the *Reino* did not declare independence as provinces but rather as cities, towns, and villages. As México continued to fight its war for independence, one of its generals, Agustín Iturbide, proclaimed the Plano of Iguala on February 24, 1821. This declaration explained the terms under which México would secure independence. On August 24, 1821, Iturbide and the Spanish Viceroy Juan O'Donojú agreed on the Plan and Mexican independence. News of the plan reached Urrutia, the Captain General of the Kingdom of Guatemala, on May 9, 1821. Urrutia was indecisive, debating whether to hand control of the government over to the Spanish Inspector General of the Army, Gabino Gaínza. For his part, Gaínza at first refused control because he did not want to do anything to further independence, but eventually he relented and took responsibility for the Kingdom. He learned on September 13 that the more northern Guatemalan provinces of Tehuantepec and Chiapas had declared both independence from Spain and annexation to México (Karnes 1961, 19).

A series of provincial decisions to secede from Spain ensued. Gaínza organized a meeting of the elites of Guatemala City. They agreed that same day, September 15, 1821, to declare independence from Spain. They did not consult the opinions of the populations

outside the capital. Across the Kingdom it was difficult to determine the majority view in any town, city, or village (Karnes 1961, 20). San Salvador's *junta* voted for independence on September 29, 1821. It also proposed the formation of a federation with the cities of León (Nicaragua) and Comayagua (Honduras) (Karnes 1961, 20). Members of the San Salvador *junta* argued that they wanted neither Spain nor Guatemala to dominate them any longer and that a federation of these three provinces would prevent it. León declared its independence from both Spain and Guatemala on September 28, 1821 (Karnes 1961, 21). This decision by León in favor of annexation to México did not apply to the other cities in Nicaragua. Villa Nicaragua voted to join México, but Granada chose to stay with Guatemala (Karnes 1961, 21-22).

After a number of villages, cities, and provinces declared their independence from Spain, those same political entities voted, according to majority rule, to join the newly independent Mexican Kingdom under Iturbide. In other words, the cities and villages committed to a decision that would reflect the majority of villages and cities rather than the majority of the population. This arrangement did not last long. All but the province of Chiapas voted to leave Mexico.

Challenges to Iturbide's governance of the Empire multiplied until he finally fell, placing Central America in roughly the same position it had before joining México (Humphreys 1946, 40). Central America's inclusion in the Mexican Empire lasted from January 1821 until March of 1823 (Karnes 1961, 29). Iturbide's authoritarian response to Congress' refusal to follow his plans constituted one of the earliest signs that Iturbide's Empire would not last. The historical record is unclear as to on what basis he did it, but Iturbide became Emperor on July 21, 1822. Demands for federalism spread, and military heroes from the wars for Mexican independence raised provincial armies in support of

those demands (Karnes 1961, 27). In October of 1823 Iturbide dissolved the Congress and appointed his own cabinet to help him rule (Karnes 1961, 27). One of the heroes from the wars for independence, General Antonio López de Santa Anna, declared his public opposition to Iturbide and defeated the Emperor's forces. Santa Anna marched on Mexico City and Iturbide went into exile (Karnes 1961, 27).

Filísola may have been the leader of the entire Kingdom of Guatemala, but he only had the ability to create a temporary government and call for the creation of a congress, as according to the Kingdom's 1821 Declaration of Independence. He called for the provinces to elect deputies to represent them at that congress (Karnes 1961, 29). Filísola called for the congress before he heard news of Iturbide's removal (Karnes 1961, 29). He issued his decree of March 29, 1823 according to the second article of the Kingdom's Act of Independence of 1821. The delegates to the constituent congress were not members of a preexisting national political system that governed the entire Kingdom as one unit, but rather, they were representatives from the provinces that were now in effect their own countries. The disintegration was even more profound. Within each province multiple cities existed, even though the intendancy system had chosen one as the provincial capital. The intendancies were now at least formally defunct since the provinces were no longer part of the Spanish Empire.

The Constituent Assembly formally consisted of sixty four delegates, but it only reached that number near the end of the entire process. Hence many of the Assembly's earliest decisions did not have the formal approval of the entire region. The Assembly adopted the second Declaration of Independence, for example, with only forty one deputies present (Table 5.4). Alternate deputies (*suplentes*) constituted ten of those signatories, and only one of those alternates signed his name as a substitute for a regular

deputy. The other nine alternate deputies merely duplicated the signatures of the official deputies. At that initial adoption of the second Declaration of Independence, in other words, only thirty one of sixty four participated in the vote. Even though the vote had a unanimous result, it included only a minority of the full Assembly's full complement of representatives. All but one of those representatives, moreover, hailed from Guatemala or San Salvador. Honduras, Nicaragua, and Costa Rica would ratify the declaration only much later. The Assembly tacitly admitted this deficiency in the second declaration of independence by issuing a third declaration of independence once enough representatives had arrived from Honduras, Nicaragua, and Costa Rica.

Table 5.4 - Signatories to Second Central American Declaration of Independence, July 1, 1823

Name	#	Constituency	Ideology
Guatemala: Diputados Propietarios/Titulares			
José Domingo Estrada	**1**	Chimaltenango	Liberal
Simeón Cañas	**2**	Chimaltenango	Liberal
Luis Francisco de Barrutia	**3**	Chimaltenango	Bureaucrat; SEAP; Conservative leaning[26]
José María Castilla[27]	**4**	Cobán	Liberal; Cleric
José Beteta	**5**	Salamá	Liberal[28]
José María Ponce	**6**	Escuíntla	Conservador
Pedro Molina	**7**	Guatemala City	Liberal
José Francisco Barrundia	**8**	Guatemala	Liberal
Mariano Córdova	**9**	Huehuetenango	Conservative[29]
Francisco Javier Valenzuela	**10**	Jalapa	Liberal[30]
Cirilo Flores	**11**	Quezaltenango	Liberal[31]
Francisco Flores	**12**	Quezaltenango	Liberal
José Antonio Peña	**13**	Quezaltenango	Liberal
Lázaro José Herrarte y Morales (b. 1784)	**14**	Suchitepéquez	
Serapio Sánchez	**15**	Totonicapán	Liberal
Mariano Gálvez	**16**	Totonicapán	Liberal
Fernando Antonio Dávila	**17**	Zacatepéquez	Liberal
Julián Castro	**18**	Zacatepéquez	Cleric
José Antonio Alcayaga	**19**	Zacatepéquez	Liberal[32]

[26] government official during the Empire; Regidor Alguacil Mayor del M.N.A.; founding member of Amigos del País de Guatemala

[27] member with José Beteta, Pedro Molina, Manuel Montúfar, and Marcial Zebadúa of José Barrundia's secretive Tertulia Patriótica that worked toward independence; cleric; canon; gave sermon justifying independence at mass celebrated after 1821 independence was declared

[28] member with José María Castilla, Pedro Molina, Manuel Montúfar, and Marcial Zebadúa of José Barrundia's secretive Tertulia Patriótica that worked toward independence

[29] {WoodwardJr:1996wb p. 85}

[30] {TownsendEzcurra:1973tz p. 132, 368}

[31] {WoodwardJr:1996wb p. 70}

[32] ;{Belaubre:2007uo} Vicario general de la diocesis de Guatemala, cura de San Miguel Dueñas

Table 5.4, continued			
Name	**#**	**Constituency**	**Ideology**
Guatemala: Diputados Propietarios/Titulares			
Miguel Ordóñez	**20**	San Agustín	
	21		
El Salvador: Diputados Propietarios/Titulares			
Leoncio Domínguez	**22**	San Miguel	
Jose Matías Delgado	**23**	San Salvador	
José Antonio Jiménez	**24**	San Salvador	
Juan Vicente Villacorta	**25**	San Vicente	
Ciriaco Villacorta	**26**	San Vicente	
Jose Francisco Córdova	**27**	Santa Ana	
Marcelino Menéndez	**28**	Santa Ana	
Isidro Menéndez	**29**	Sonsonate	
Felipe Vega	**30**	Sonsonate	
Pedro Campo Arpa	**31**	Sonsonate	Liberal
Antonio José Cañas	**32**	Cojutepeque	
Honduras: Diputados Propietarios			
Francisco Aguirre	**33**	Olancho	Conservador
Guatemala: Diputados Suplentes			
Felipe Márquez	1	Chimaltenango	
Juan Miguel Beltranena	2	Cobán	Conservador
Jose Antonio Larrave y Velasco	3	Esquipulas	SEAP[33]
José Antonio Azmitia	4	Guatemala	
Francisco Benavente (substitute for Juan Nepomuceno Fuentes)	5	Quezaltenango	Liberal
José María Herrarte (substitutes for José María Agüero)	6	Totonicapán	
J. Domingo Diéguez (substitute for Mariano Centeno)	7	Zacatepéquez	Conservador

[33] director of the Sociedad Económica de Amigos del País

Table 5.4, continued			
El Salvador: Diputados Suplentes			
Mariano Beltranena	8	San Miguel	Conservador
Pedro José Cuéllar (substitute for Mariano Calderón)	9	San Salvador	
Juan Francisco de Sosa	10	San Salvador	Conservador[34]
(José) Simón Vasconcelos y Vides	11	San Vicente	
Guatemala: Diputados Ausentes			
Mariano Centeno (substituted by J. Domingo Diéguez)	Propietario	Zacatepéquez	
José Valdez	Propietario	Sololá	
Antonio González	Suplente	Sololá	
Juan Nepomuceno Fuentes (substituted by Francisco Benavente)	Propietario	Quezaltenango	
José María Agüero (substituted by José María Herrarte)	Propietario	Totonicapán	
José María Herrera	Propietario	Huehuetenango	
Eusebio Arzate	Propietario	Huehuetenango	Cleric
José Ignacio Grijalva	Propietario	Chiquimula	
Bernardo Escobar	Suplente	Chiquimula	
Basilio Chavarría	Suplente	Salamá	Liberal
El Salvador: Diputados Ausentes			
Mariano Calderón (substituted by Pedro José Cuéllar)	Propietario	San Salvador	
José Vicente Orantes	Propietario	Conguaco	
Valerio Coronado	Suplente	Conguaco	
Pedro Mártir Acosta	Propietario	Tejutla y Chalatenango	
Miguel Mendoza	Propietario	Tejutla y Chalatenango	
José Ignacio Marticorena	Suplente	Tejutla y Chalatenango	
Diego Mariano Arce	Suplente	Tejutla y Chalatenango	
Joaquín Letona	Propietario	Cojutepeque	
Norberto Morán	Propietario	Sonsonate	

[34] {WoodwardJr:1996wb p. 85}

Table 5.4, continued.			
Honduras: Diputados Ausentes			
Juan Miguel Fiallos	Propietario	Comayagua	Conservador
José Nicolás Irías	Propietario	Comayagua	Conservador
Cayetano Bosque	Propietario	Comayagua	Conservador
Francisco Antonio Márquez	Propietario	Tegucigalpa	Liberal[35]
Próspero Herrera	Propietario	Tegucigalpa	Conservador
José Jerónimo Zelaya	Propietario	Gracias	Conservador
Juan Estéban Milla	Propietario	Gracias	Conservador
Miguel Pineda	Propietario	Gracias	Conservador
José Francisco Zelaya	Propietario	Santa Bárbara	Conservador
Joaquín Lindo	Propietario	Olanchito	Conservador
Pío José Castellón	Propietario	Segovia	Conservador
Nicaragua: Diputados Ausentes			
Filadelfo Benavente	Propietario	Matagalpa	
Manuel Barberena	Propietario	León	
Francisco Quiñónez	Propietario	León	
Juan Modesto Hernández	Propietario	León	
Toribio Argüello	Propietario	León	
Benito Rosales	Propietario	Granada	
Manuel Mendoza	Propietario	Granada	
José Pío Bolaños	Propietario	Masaya (never arrived)	
Tomás Muñoz	Propietario	Masaya	Conservador
Costa Rica: Diputados Ausentes			
Pablo Alvarado	Propietario		
Luciano Alfaro	Propietario		
José Antonio Alvarado	Propietario		
Juan de los Santos	Propietario		

[35] cleric who taught both Morazán José Antonio Márquez

Table 5.5 – Representatives to the First Federal Congress (1825)			
Nicaragua			
Miguel de Larreinaga	*Diputado*		León
El Salvador			
Doroteo Vasconcelos			San Vicente
Honduras			
José Cecilio del Valle	*Diputado*		Tegucigalpa
José Jerónimo Zelaya	*Diputado*		Gracias
Juan Esteban Ulloa	*Diputado*		Gracias
Joaquín Lindo	*Diputado*		Comayagua
José Francisco Zelaya	*Diputado*		Comayagua

The First Act of Independence had apportioned one delegate for every 15,000 persons. At the time, no census existed for the populations of the provinces, so they estimated (Karnes 1961, 35). The Assembly did not reach the full complement of 64 until October 1823. With only the 41 delegates from Guatemala and San Salvador present, the Assembly began on. The malapportionment favored San Salvador the most and considerably disadvantaged Guatemala. Assuming that the provinces voted en bloc, Guatemala did not have a majority of the delegates. On November 22, 1824, the Assembly adopted the Constitution. The Constitution grouped the names of the deputies according to their states.

The other provinces, which had long harbored resentment toward the capital province, did have a majority. The province of Guatemala could reach a majority by convincing any one of El Salvador, Honduras, or Nicaragua to vote with it, but convincing Costa Rica would only result in a tie. It was not a foregone conclusion that the delegates from a given province would represent their provinces rather than their cities, but the selection process made it more likely. Rather than have the cities or

groupings of cities, towns, and villages choose the delegates, the provisional government used the same *juntas electorales* that had chosen the delegates to the Cortes in Spain.

Table 5.6 – Delegates (1823), Population (1824), and Malapportionment in the Constituent Assembly of *Las Provincias Unidas de Centroamérica*

Province	Titulares	according to Karnes	Suplentes	Total	Population (according to Karnes 1824)	People/Delegate
Guatemala	32	28			660,580	23,592
El Salvador	18	13			212,573	16,352
Honduras	11	11			207,269	18,842
Nicaragua	8	8			137,069	17,134
Costa Rica	4	4			70,000	17,500
Total	73					

Table 5.7 – Delegates (1825), Population (1778, 1824), and Malapportionment in the First Federal Congress of *Las Provincias Unidas de Centroamérica*

Province	Titulares Allotted 1825 actually used	Titulares Allotted if they had used true 1824 population	Population 1778	People/Delegate 1778 figures
Guatemala	18	20	660,580	23,592
El Salvador	9	9	212,573	16,352
Honduras	6	5	207,269	18,842
Nicaragua	6	6	137,069	17,134
Costa Rica	2	2	70,000	17,500
Total	73			

Determining the size of the Asamblea Constituyente requires some investigation beyond secondary sources. Several accounts, even native ones, total the size of the Assembly at sixty four *diputados*. They base this number on the list of signatories to the 1824 Constitution (Karnes 1961; Herrarte 1963). But a number of other secondary sources, such as Townsend (Townsend Ezcurra 1973, 67-79) and Avendaño (Avendaño Rojas 2009), indicate a larger Assembly. Many of the elected *diputados* did not sign the Constitution because they did not attend that session. Both Townsend and Avendaño name *diputados* who participated in the Asamblea but did not sign the Constitution. From their data we can conclude that the Assembly included seventy three rather than sixty four *diputados*.

We have an additional reason, besides the members who did not sign the Constitution, to reject a count of sixty four. The false claim that the body lacked a quorum puts it in doubt. Karnes mentions that the Constituent did not have a quorum both when it opened and when it issued the Second Declaration of Independence on July 1, 1823 (Karnes 1961, 35). A quorum often consists in a majority of a given legislative body, but *Constituyente* had a quorum of two thirds. If the full Constituent Assembly included sixty four members, a quorum would have required the presence of at least thirty three of those members. When we do not count the *suplentes* who signed the Second Declaration, the Constituent Assembly had thirty three members present. Thirty three of sixty four meets the requirement for a quorum.

But the true number of *propietario* signatures reached even higher. The signatories who counted as *propietarios* increases when we count those *suplentes* who signed the Second Declaration of Independence in lieu of missing *propietarios*. Only a *suplente* from the same constituency as a missing *propietario* could vote in place of that

missing *propietario*. Such *suplentes* had to come from not only the same province but also the same district as the missing *propietario*. The inclusion of those *suplentes* adds four *propietario* votes/signatures to the Second Declaration of Independence, raising the total number of *propietario* votes to thirty seven.

If the Assembly lacked a majority to conduct business, then the total number of *propietario* members would have needed at least seventy three. And, in fact, the Assembly had seventy three members.

Table 5.8 – Delegates to the Constituent Assembly of *Las Provincias Unidas de Centroamérica*

Name	City	Position	Ideology
Guatemala Province (32 Propietarios, 10 Suplentes, 42 Total)			
Pedro Molina	Guatemala City	Propietario 1	Liberal
José Barrundia	Guatemala City	Propietario 2	Liberal
José Antonio Azmitia	Guatemala City	Suplente 1	Conservative[36]
Fernando Antonio Dávila	Sacatepéquez	Propietario 3	Liberal[37]
José Antonio Alcayaga	Sacatepéquez	Propietario 4	Liberal
(José) Julián Castro	Sacatepéquez	Propietario 5	Cleric[38]
Mariano Centeno	Sacatepéquez	Propietario 6	Liberal[39]
Domingo Diéguez	Sacatepéquez	Suplente 2	Conservador[40]
José (Esteban) Valdez (Valdes)	Sololá	Propietario 7	Conservador[41]
Antonio González	Sololá	Suplente 3	*Conservador*[42]
José Domingo Estrada	Chimaltenango	Propietario 8	Liberal[43]
José Simeón Cañas	Chimaltenango (Cañas also elected by Sacatecoluca in San Salvador)	Propietario 9	Exaltado/Fiebre [44]

[36] {WoodwardJr:1992tu p. 560}
[37] anticlerical cleric
[38] cleric and doctor of theology
[39] ally of Morazán, appointed by Morazán to be leader of state of Guatemala under the Federation
[40] {MoralesBanos:1985uq}
[41] cleric and doctor of theology, treasurer of the Catholic Cathedral in Guatemala City
[42] cleric
[43] one of two main sponsors for abolition of slavery
[44] cleric, main proponent for the abolition of slavery

Table 5.8, continued			
Luis Francisco de Barrutia	Chimaltenango	Propietario 10	*Conservador*[45]
Felipe Márquez	Chimaltenango	Suplente 4	Conservador
Cirilo Flores	Quetzaltenango	Propietario 11	Conservative→ Liberal
Francisco Flores	Quetzaltenango	Propietario 12	Liberal
José Antonio Peña	Quetzaltenango	Propietario 13	Liberal
Juan Nepomuceno Fuentes Albares	Quetzaltenango	Propietario 14	Conservador[46]
Francisco Benavente	Quetzaltenango	Suplente 5	Liberal
Mariano Gálvez	Totonicapán	Propietario 15	Conservative→ Liberal
Serapio Sánchez	Totonicapán	Propietario 16	Exaltado/Fiebre
José María Agüero	Totonicapán	Propietario 17	Conservador[47]
José María Herrarte	Totonicapán	Suplente 6	Liberal
Mariano Córdova	Huehuetenango (Córdova also elected to Salamá in Guatemala)	Propietario 19	Conservador
José María Herrera	Huehuetenango	Propietario 20	
Eusebio Arzate	Huehuetenango	Propietario 21	Cleric
Miguel Ordóñez	San Agustín Acasaguastlán	Propietario 22	
José Ignacio Grijalva	Chiquimula	Propietario 23	
Joaquín del Campo	Chiquimula	Propietario 24	

[45] former regidor, Spaniard
[46] cleric
[47] cleric

Table 5.8, continued			
Bernardo Escobar	Chiquimula (Suplente replacing Joaquín del Campo)	Suplente 7	
José Antonio Larrave	Esquipulas	Suplente 8	Liberal[48]
Antonio de Rivera y Cabezas	Suchitepéquez (Suplente later replacing Lázaro Herrarte)	Suplente 9	Exaltado/Fiebre
Lázaro Herrarte	Suchitepéquez (later replaced by Antonio Rivera Cabezas)	Propietario 25	
José María Castilla	Cobán	Propietario 26	Liberal[49]
Juan Miguel Beltranea	Cobán	Propietario 27	Conservador
José Beteta	Salamá	Propietario 28	Conservador
Mariano Córdova	Salamá (elected also to Huehuetenango)	Propietario 29	Conservador[50]
Basilio Chavarría	Salamá (suplente replacing Mariano Córdova)	Suplente 10	Liberal
José María Ponce	Escuintla	Propietario 30	Conservador
Francisco Javier Valenzuela	Jalapa	Propietario 31	Liberal
No One	Petén	NA	NA
Norberto Morán	Sonsonate	Propietario 32	

[48] {WoodwardJr:1992tu p. 163}

[49] member with José Beteta, Pedro Molina, Manuel Montúfar, and Marcial Zebadúa of José Barrundia's secretive Tertulia Patriótica that worked toward independence cleric; canon; gave sermon justifying independence at mass celebrated after 1821 independence declared

[50] {WoodwardJr:1996wb p. 85}

Table 5.8, continued			
Francisco Carrascal	Soconusco (later became part of México, but still part of Guatemala in 1823)	NA	Liberal[51]
Provincia de San Salvador (18 Propietarios, 6 Suplentes, 24 Total Delegates)			
José Matías Delgado	San Salvador City		Propietario 1
José Antonio Jiménez	San Salvador City		Propietario 2
Pedro José Cuéllar	San Salvador City		Suplente 1
Juan Francisco Sosa	San Salvador City		Suplente 2 / Liberal
Mariano Calderón	San Salvador City		Propietario 3
José Vicente Orantes	Conguaco (never present at assembly)		Propietario 4
Valerio Coronado	Conguaco (never present at assembly)		Suplente 3
Pedro Mártir Acosta	Tejutla y Chalatenango (later replaced by Diego Mariano Arce)		Propietario 5
Miguel Mendoza	Tejutla y Chalatenango (later replaced by José Ignacio Marticorena)		Propietario 6
José Ignacio Marticorena	Tejutla y Chalatenango (as a substitute for Miguel Mendoza)		Suplente 3
Diego Mariano Arce	Tejutla y Chalatenango (as a substitute for Pedro Mártir Acosta)		Suplente 4
José Francisco de Córdova	Santa Ana		Propietario 7
Marcelino Menéndez	Santa Ana		Propietario 8
Antonio José Cañas	Cojutepeque (later replaced by Joaquín Letona)		Propietario 9
Joaquín Letona	Cojutepeque (later replaced Antonio José Cañas)		Suplente 5
Mariano Navarrete	Sacatecoluca		Propietario 10
Felipe Vega	Sonsonate		Propietario 11
Isidro Menéndez	Sonsonate		Propietario 12 / Liberal
Pedro Campo Arpa	Sonsonate		Propietario 13 / Liberal
Leoncio Domínguez	San Miguel		Propietario 14
Toribio Roldán	San Miguel		Propietario 15

51

Table 5.8, continued			
Mariano Beltranena y Llano	Gotera (suplente for San Miguel from 06/09/1823-08/09/1823)	Propietario 16	Conservador
Juan Vicente Villacorta	San Vicente	Propietario 17	Liberal
Ciriaco Villacorta	San Vicente	Propietario 18	Liberal
Simón Vasconcelos	San Vicente	Suplente 6	Liberal
Honduras (11 Propietarios, 1 Suplente, 12 Total Delegates)			
Juan Francisco Aguirre	Olancho	Propietario 1	Conservador
Juan Miguel Fiallos	Comayagua	Propietario 2	Conservador
José Nicolás Irías	Comayagua	Propietario 3	Conservador
Cayetano Bosque	Comayagua	Suplente 1	Conservador
Francisco Márquez	Tegucigalpa	Propietario 4	Liberal
Próspero Herrera	Tegucigalpa	Propietario 5	
José Jerónimo Zelaya	Gracias	Propietario 6	Conservador
Juan Estéban Milla	Gracias	Propietario 7	
Miguel Pineda	Gracias	Propietario 8	Conservador
José Francisco Zelaya	Santa Bárbara	Propietario 9	Conservador
Joaquín Lindo	Olanchito	Propietario 10	Conservador
Pío José Castellón	Segovia	Propietario 11	Conservador
Nicaragua (9 Propietarios)			
Filadelfo Benavente	Matagalpa	Propietario 1	Conservador
Manuel Barberena	León	Propietario 2	Conservador

Table 5.8, continued			
Francisco Quiñónez	León	Propietario 3	Conservador[52]
Juan Modesto Hernández	León	Propietario 4	Liberal
Toribio Argüello	León	Propietario 5	Conservador
Benito Rosales	Granada	Propietario 6	Liberal
Manuel Mendoza	Granada/Masaya	Propietario 7	Conservador
José Pío Bolaños[53]	Masaya (never arrived)	Propietario 8	
Tomás Muñoz	Masaya	Propietario 9	Conservador[54]
Costa Rica (4 Propietarios)			
Pablo Alvarado	Costa Rica	Propietario 1	Liberal[55]
Luciano Alfaro	Costa Rica	Propietario 2	Conservador[56]
José Antonio Alvarado	Costa Rica	Propietario 3	Liberal[57]
Juan de los Santos de Madriz	Costa Rica	Propietario 4	Liberal[58]
TOTALS		74 Propietarios	
		17 Suplentes	

14[52]

[53]

14[54] cleric

[55] {TownsendEzcurra:1973tz p. 78}

[56] {TownsendEzcurra:1973tz p. 78}; cleric

[57] {TownsendEzcurra:1973tz p. 78}

[58] {TownsendEzcurra:1973tz p. 78}

Table 5.9 - Signatories to Second Central American Declaration of Independence, July 1, 1823

Name	#	Constituency	Ideology
Guatemala: Diputados Propietarios/Titulares			
José Domingo Estrada	**1**	Chimaltenango	Liberal
Simeón Cañas	**2**	Chimaltenango	Liberal
Luis Francisco de Barrutia	**3**	Chimaltenango	Bureaucrat; SEAP; Conservative leaning[59]
José María Castilla[60]	**4**	Cobán	Liberal; Cleric
José Beteta	**5**	Salamá	Liberal[61]
José María Ponce	**6**	Escuíntla	Conservador
Pedro Molina	**7**	Guatemala City	Liberal
José Francisco Barrundia	**8**	Guatemala	Liberal
Mariano Córdova	**9**	Huehuetenango	Conservative[62]
Francisco Javier Valenzuela [63]	**10**	Jalapa	Liberal

[59] government official during the Empire; Regidor Alguacil Mayor del M.N.A.; founding member of Amigos del País de Guatemala

[60] member with José Beteta, Pedro Molina, Manuel Montúfar, and Marcial Zebadúa of José Barrundia's secretive Tertulia Patriótica that worked toward independence cleric; canon; gave sermon justifying independence at mass celebrated after 1821 independence declared

[61] member with José María Castilla, Pedro Molina, Manuel Montúfar, and Marcial Zebadúa of José Barrundia's secretive Tertulia Patriótica that worked toward independence

[62] {WoodwardJr:1996wb p. 85}

[63] (dob: 12-23-1795)

Table 5.9, continued			
Name	**#**	**Constituency**	**Ideology**
Cirilo Flores	**11**	Quezaltenango	Liberal[64]
Francisco Flores	**12**	Quezaltenango	Liberal
José Antonio Peña	**13**	Quezaltenango	Liberal
Lázaro José Herrarte y Morales (b. 1784)	**14**	Suchitepéquez	
Serapio Sánchez	**15**	Totonicapán	Liberal
Mariano Gálvez	**16**	Totonicapán	Liberal
Fernando Antonio Dávila	**17**	Zacatepéquez	Conservador
Julián Castro	**18**	Zacatepéquez	
José Antonio Alcayaga	**19**	Zacatepéquez	Moderado/Conservador
Miguel Ordóñez	**20**	San Agustín	
	21		
El Salvador: Diputados Propietarios/Titulares			
Leoncio Domínguez	**22**	San Miguel	
Jose Matías Delgado	**23**	San Salvador	

[64] {WoodwardJr:1996wb p. 70}

Table 5.9, continued			
Name	**#**	**Constituency**	
José Antonio Jiménez	**24**	San Salvador	
Juan Vicente Villacorta	**25**	San Vicente	
Ciriaco Villacorta	**26**	San Vicente	
Jose Francisco Córdova	**27**	Santa Ana	
Marcelino Menéndez	**28**	Santa Ana	
Isidro Menéndez	**29**	Sonsonate	
Felipe Vega	**30**	Sonsonate	
Pedro Campo Arpa	**31**	Sonsonate	
Antonio José Cañas	**32**	Cojutepeque	
Honduras: Diputados Propietarios/Titulares			
Francisco Aguirre	**33**	Olancho	Conservador
Guatemala: Diputados Suplentes			
Felipe Francisco José Márquez y Sunsín de Herrera	1	Chimaltenango	Conservador

Table 5.9, continued			
Name	**#**	**Constituency**	**Ideology**
Juan Miguel Beltranena	2	Cobán	Conservador
Jose Antonio Larrave y Velasco	3	Esquipulas	SEAP[65]
José Antonio Azmitia	4	Guatemala	Liberal
Francisco Benavente (substitute for Juan Nepomuceno Fuentes)	5	Quezaltenango	Liberal
José María Herrarte (substitutes for José María Agüero)	6	Totonicapán	
J. Domingo Diéguez (substitute for Mariano Centeno)	7	Zacatepéquez	Conservador

[65] director of the Sociedad Económica de Amigos del País

Table 5.9, continued			
Name	**#**	**Constituency**	**Ideology**
El Salvador: Diputados Suplentes			
Mariano Beltranena	8	San Miguel	Conservador
Pedro José Cuéllar (substitute for Mariano Calderón)	9	San Salvador	
Juan Francisco de Sosa	10	San Salvador	Conservador[66]
(José) Simón Vasconcelos y Vides	11	San Vicente	
Guatemala: Diputados Ausentes			
Mariano Centeno (substituted by J. Domingo Diéguez)	Propietario/ Titular	Zacatepéquez	
José Valdez	Propietario/ Titular	Sololá	
Antonio González	Suplente	Sololá	

[66] {WoodwardJr:1996wb p. 85}

Table 5.9, continued			
Name	**#**	**Constituency**	
Guatemala: Diputados Ausentes			
Juan Nepomuceno Fuentes (substituted by Francisco Benavente)	Propietario/ Titular	Quezaltenango	
José María Agüero (substituted by José María Herrarte)	Propietario/ Titular	Totonicapán	
José María Herrera	Propietario/ Titular	Huehuetenango	
Eusebio Arzate	Propietario/ Titular	Huehuetenango	Cleric
José Ignacio Grijalva	Propietario/ Titular	Chiquimula	
Bernardo Escobar	Suplente	Chiquimula	
Basilio Chavarría	Suplente	Salamá	Liberal
El Salvador: Diputados Ausentes			
Mariano Calderón (substituted by Pedro José Cuéllar)	Propietario/ Titular	San Salvador	

Table 5.9, continued			
Name	**#**	**Constituency**	
El Salvador: Diputados Ausentes			
José Vicente Orantes	Propietario/ Titular	Conguaco	
Valerio Coronado	Suplente	Conguaco	
Pedro Mártir Acosta	Propietario/ Titular	Tejutla y Chalatenango	
Miguel Mendoza	Propietario/ Titular	Tejutla y Chalatenango	
José Ignacio Marticorena	Suplente	Tejutla y Chalatenango	
Diego Mariano Arce	Suplente	Tejutla y Chalatenango	
Joaquín Letona	Propietario/ Titular	Cojutepeque	
Norberto Morán	Propietario/ Titular	Sonsonate	
Honduras: Diputados Ausentes			
Juan Miguel Fiallos	Propietario/ Titular	Comayagua	Conservador
José Nicolás Irías	Propietario/ Titular	Comayagua	Conservador
Cayetano Bosque	Propietario/ Titular	Comayagua	Conservador
Francisco Márquez	Propietario/ Titular	Tegucigalpa	Liberal
Próspero Herrera	Propietario/ Titular	Tegucigalpa	Conservador

Table 5.9, continued			
José Jerónimo Zelaya	Propietario/ Titular	Gracias	Conservador
Juan Estéban Milla	Propietario/ Titular	Gracias	Conservador
Miguel Pineda	Propietario/ Titular	Gracias	Conservador
José Francisco Zelaya	Propietario/ Titular	Santa Bárbara	Conservador
Joaquín Lindo	Propietario/ Titular	Olanchito	Conservador
Pío José Castellón	Propietario/ Titular	Segovia	Conservador
Nicaragua: Diputados Ausentes			
Filadelfo Benavente	Propietario/ Titular	Matagalpa	
Manuel Barberena	Propietario/ Titular	León	
Francisco Quiñónez	Propietario/ Titular	León	
Juan Modesto Hernández	Propietario/ Titular	León	
Toribio Argüello	Propietario/ Titular	León	
Benito Rosales	Propietario/ Titular	Granada	
Manuel Mendoza	Propietario/ Titular	Granada	
José Pío Bolaños	Propietario/ Titular	Masaya (never arrived)	
Tomás Muñoz	Propietario/ Titular	Masaya	Conservador

Table 5.9, continued		
Nicaragua: Diputados Ausentes		
Pablo Alvarado	Propietario/ Titular	Liberal
Luciano Alfaro	Propietario/ Titular	Conservador
José Antonio Alvarado	Propietario/ Titular	Liberal
Juan de los Santos Madrid	Propietario/ Titular	Liberal

The Mexican Empire had barely started when it already began to collapse. When the National Congress resisted him, Iturbide dissolved it on October 31 of 1822. On December 2, 1822, General Santa Anna launched an insurgency against Iturbide. On February 25, 1823, Filísola received a message from Mexican generals Echavarri and Cortázar containing both their *Plan de Casamate* and the *Plan de Veracruz* of Mexican generals Santa Anna, Guerrero, and Bravo. The first declaration called for the reinstatement of the National Congress that Iturbide had dissolved illegally in 1822, while the second declaration called for a new National Congress. Neither explicitly called for Iturbide's removal. The *Plan de Veracruz*, in fact, called for retaining Iturbide as Emperor.

But more importantly for Central America, the *Plan de Casamate* proclaimed that each province in the Mexican Empire would govern itself until the new Congress met in México City. In effect, this meant that Central America during most of its time as part of the Empire, had even more than *de facto* self government. The former *Reino* also had a *de jure* justification for that autonomy well before Iturbide fell on March 19, 1823. Both

Gaínza and Filísola functioned as armed caretakers for the region, but they received no orders from México City regarding daily governance of the provinces. The Mexican government instructed them to subdue El Salvador, but, once subdued, that province had its own local diputación provincial. In order to keep the provinces of the *Reino* together, both Gaínza and Filísola walked a fine line between enforcing order and tolerating expressions of autonomy in both Guatemala and the other provinces. Dispositionally conservative at least in part because of their military vocations, they wanted to maintain the *status quo* of an integrated Central America, even if it meant allowing for a greater role for the elites of the other provinces.

On February 7, 1823, a message arrived from General Bravo, entreating Filísola to formally support the uprising against Iturbide. Filísola wrote to all of the provinces on February 12, 1821, explaining the situation in México, his opinions about it, and what he was doing in response. On February 13, Filísola ordered his military subordinates and local political leaders throughout Central America to maintain the unity of the region so long as the Mexican government still existed. Even if Iturbide abdicated, Filísola reasoned, Central America could still remain part of México. Filísola sent a letter to the insurgent generals on March 10, 1823 to explain why he would not join in their fight. He wrote that joining the fight in México would mean abandoning his duty to take care of Central America that the Mexican government had entrusted to him.

Cirilo Flores, who favored the annexation and served as one of Guatemala's representatives in the Mexican National Congress, had returned to his native Quezaltenango, disillusioned with Guatemala's union with Iturbide's Empire. Iturbide had closed the 1822 National Congress when it defied his wishes, leaving representatives like Flores with nothing to do in México City.

When news of Iturbide's removal reached Guatemala City, Filísola had already called for elections to choose a new *Constituyente* that would decide the future of the Central American provinces. In an attempt to forestall the insurgencies against him, Iturbide had reinstated the National Congress of 1823 on March 7, 1823. On March 19, 1823, Iturbide offered his abdication to the reinstated 1822 National Congress in México City, but the Congress rejected it immediately. The representatives meant to retroactively invalidate and render illegal Iturbide's time as Emperor. Without having committed any new offense, Iturbide would be guilty of the high crime of usurpation.

The Central American *liberales* who opposed annexation to México did not vanish after the consummation of the union. When Filísola released the Guatemalan anti-annexionists that his predecessor Gaínza had jailed in Guatemala City, they rejoined the anti-annexionists whom Gaínza had not jailed. Now reunited, they made their resistance more surreptitious. These *liberales* waited for their moment to resist openly. They recognized that México would have to descend into more chaos and foist greater centralization on Central America. Only then would the people of the region, who had voted overwhelmingly in favor of annexation, consider reversing their decision.

As political and military turbulence increased in México, anti-annexionist *liberales* in Guatemala City, such as Rafael Lambur, José María Molina, José Herrarte, and José Cornejo, decided to use those disturbances to further the anti-annexionist cause. In the guise of celebrating the 1823 anniversary of Central America's first independence on September 19, 1821, they reminded the denizens of the capital that Central America had once been proudly independent of México.

Filísola decreed that the Assembly would gather under the schema detailed by the first declaration of independence that had been promulgated on September 15, 1821

before the annexation to México. A diputación provincial that had been elected according to the Mexican Empire's Constitution still governed the province of Guatemala, notwithstanding the separation of Guatemala from México.

The central debates in the *Constituyente* pitted *liberales*, who favored either decentralized federalism or outright disintegration, against the *conservadores*, who preferred a unitary state but might have been willing to settle for centralized federalism, especially if the only alternative to federalism was the complete disintegration of the *Reino*. Because they had favored annexation to México, the failure of Iturbide's Empire had put *conservadores* throughout Central America in disrepute. Before annexation, most Central Americans had assumed that the law and order present in México would bring tranquility to Central America once annexation had taken place. But every passing day after annexation brought news of more internecine fighting in México. Closer to home, the decision to join México had split Costa Rica from Nicaragua, divided Costa Rica in two, and required the military subjugation of El Salvador. It now appeared that México, rather than Central America, was the partner bringing tumult to the Mexican-Central American union.

As an ally of the *conservadores* who favored, centralization, unification, and annexation with México, Filísola may have wanted the elections to take place before distaste for the *conservadores* had settled into the electorate (Lujan Muñoz:1982, 35). If this was his goal, he was not successful in achieving it. Elections so soon after the failure of the union with México likely had just the opposite effect.

According to Antonio Morales Baños, only four of the signatories to the Second Declaration Independence belonged to the *conservadores*: Francisco Aguirre, José María Ponce, Pedro Antonio Dávila, José Domingo Diéguez, Francisco de Sosa, Juan Miguel

Beltranena, and Mariano Beltranena (Morales Baños 1985, 196). We do not know whom Morales means by "Pedro Antonio Dávila," for Fernando Antonio Dávila belonged to the liberales. Antonio Morales Baños likely underestimates the number of party *conservadores* when he only lists ideological *conservadores*. Others belonged to the nascent *conservador* party for other reasons such as their family connections, economic interests, Roman Catholicism, or distaste for particular members of the *liberales*.

According to Lújan Muñoz, a great deal of party and ideological switching happened among the deputies (Lujan Muñoz 1982, 35). Cirilo Flores evolved from a conservatism that had favored annexation to México to adamant republicanism. Mariano Gálvez also moved from conservatism to republicanism. The *conservadores* had become associated with the misbegotten union with México. It behooved any *conservador* to at least opportunistically feign allegiance to the liberal cause. The *liberales*, meanwhile, had fought union with México with both their words and their weapons. They had demonstrated their rejection of the now discredited Empire. It came as no surprise then that the 1823 elections gave *liberales* a dominant position in the *Constituyente* (Lujan Muñoz 1982, 40), even if some of those *liberales* were only nominally liberal. No one continued to explicitly identify as a *conservador*, and those with conservative leanings now called themselves moderates (*moderados*) or "the wise" (*juicistas*). The liberales pejoratively called them "the servile" (*serviles*). In turn, the moderates labeled the liberals as "the febrile" (*febricilantes*) and "the exalted" or "extremists" (*exaltados*).

Not only did the *liberales* initially have a strong majority in assembly. They also arrived earlier than the *conservadores*. Most of the *conservadores* came from the provinces, while most of the *liberales* came from the capital and its environs, especially San Salvador (Lujan Munoz 1982, 94). Much as variation in the arrival dates of the

various delegates influenced the final document that emerged from the 1787 Constitutional Convention in the United States, variation in the arrival dates of the various delegates influenced the final document that emerged from the 1823 *Constituyente* in Central America. In the first case, the early arrival of centralists nudged the outcome toward centralization, and in the second case the early arrival of decentralists nudged the outcome toward decentralization.

The divisions between the *liberales* and the *conservadores*, with respect to both policy preferences and group characteristics, did not coincide perfectly with the division between the advocates of federalism and those of centralism. Admittedly, the *conservadores* roughly tended to favor centralization and the *liberales* tended to favor federalism. And the dividing line regarding federalism matched the liberal vs. conservative dividing lines for some of the other policy debates. The merchants among the *conservadores* wanted protectionism and a monopoly on trade, two things that they could more easily enforce with a centralized government. The *liberales*, conversely, preferred free trade and recognized that federalism would limit the central government's ability to manipulate the market.

Most of the *conservadores* came from the provinces, while most of the *liberales* came from the capital. The former group wanted to diminish the dominance of Guatemala by placing it under a centralized government that would include more provincials in government positions than the *Reino* had permitted. Because of their strong connection to the former Kingdom's capital and the province of Guatemala, the *liberales*, on the other hand, wanted federalism in order to prevent the provinces from controlling them. If the *provincials* could not turn Central America into a centralist government in order to control the dominance of Guatemala, they preferred a federation to Guatemala's

dominance of several putatively independent Central American countries. They knew that, much as the Province of Buenos Aires came to dominate the other Argentinean provinces before they foisted federalism on it through military conquest (Falleti and Cameron 2004), Guatemala's dominance would not end unless they reigned it in with political instittions. Torres makes a similar observation:

> Later on, this [separatism] intensified with the animosity that the provinces felt toward the kingdom's capital. The provincials were loaned money and were kept at the mercy of the buyers who imposed self-serving prices for cattle and indigo. The ranchers and indigo growers developed a deep hatred for the urban exploiters. This was expressed in the federal constitution of 1823-1824, in which the provincial deputies, except those from Costa Rica, decided to establish a federal government to keep the capital from centralizing power in the new nation. (Torres 1985)

Conservadores preferred the establishment of Roman Catholicism as the official religion, while liberales not only wanted disestablishment but also sought to limit the influence of the Church with respect to education, land ownership, and law. Almost all of the country's priests belonged to the *conservadores*, but a few, such as president of the *Constituyente* José Matías Delgado and Fernando Antonio Dávila, aligned with the *liberales*. Delgado went so far as to advocate altogether for disestablishing the Roman Catholic Church.

But more than any other issue debated in the *Constituyente*, federalism vs. centralism cut across the divide between *liberales* and *conservadores*. Many of the deputies who represented the capital's liberal upper class, for instance, ultimately favored centralism. And many middle class *liberales*, such as Francisco Córdova, José María Castilla, and Fernando Antonio Dávila, did not think that a federal system could work for Central America (Lujan Muñoz 1982, 60). But the defections from conservatism to federalism far outnumbered the defections from liberalism to centralism.

Two events at this point in the federalization process placed CAF in line with Riker's model of the origins of federations. The political leadership in the capital feared the continued presence of Filísola's Mexican army in the region. The general did not need much convincing and left without many objections. He did warn that "as soon as the Mexican Division left" a threat would emerge. Filísola's army had provided law and order, but it also represented a potential threat to the civilian government. The *conservadores* emphasized the former, and the *liberales* emphasized the latter. Without Filisola's soldiers and leadership in Central America, the region became less secure from external threats and internal disturbances. Conversely, the professionalism and effectiveness of his soldiers acted as a reminder of the strength of the Mexican behemoth to the North. The presence and then absence of his Mexican troops in Central America, so close to the eve of the *Constituyente*, likely kept both of these considerations in the forefront of the founders' minds.

Table 5.10 – Traits and Policy Differences Between the Two Major Ideologies

Liberales, Exaltados, Fiebres	**Moderados, Conservadores, Serviles**
Federalism	Centralism
Free Trade	Protectionism
Exporters	Merchants
Pro-Constitution of Cádiz 1812	Anti-Constitution of Cádiz 1812
In Favor of Independence	Against Independence
Anti-Annexation to México	Pro-Annexation to México
Capital	Provinces
Old Money	New Money
Upper and Lower Classes	Middle Class
Anti-Roman Catholic Establishment	Pro-Roman Catholic Establishment

Table 5.11 – Ideologies of Some Prominent Delegates Participating in the Constituyente	
Liberales	***Conservadores***
Pedro Molina; Juan Vicente Villacorta; Antonio Rivera Cabezas; Juan Francisco Barrundia; José María Castilla; Mariano Gálvez	Tomás O'Horan; José Cecilio del Valle; Francisco Aguirre; José Dionosio Herrera; Mariano Beltranea; Miguel Beltranea; José Antonio Cañas; José Beteta

The *conservadores* and Filísola himself had warned against sending away the Mexican army. And as if on cue, an insurrection emerged as soon as Filísola had departed (Lujan Muñoz 1982, 52). Rafael Ariza y Torres' uprising constituted the first major challenge for the temporary elected triumvirate entrusted with the nascent government's executive branch (Townsend Ezcurra 1973, 203-215). The interim government had failed to pay the soldiers who formed the various parts of the informal army of Central America (Marure 1837, 58-60). Ariza held complete control over the capital for several days. Most members of the *Constituyente* fled the city. A standoff emerged when forces allied with the *moderados* arrived from the city of Quetzaltenango in Guatemala, and forces allied with the *liberales* arrived from El Salvador. Entire families began to leave the city. Liberal deputies and families fled the city in larger numbers than did *conservadores*.

Table 5.12 – Ideologies of the Delegates Who Were Members of the Commission Responsible for Drafting a Proposed Constitution	
Exaltados/Liberales	**Moderados/Conservadores**
Juan Francisco Barrundia, Isidro Menéndez, Matías Delgado, Mariano Gálvez, Pedro Molina Mazariegos, Fernando Antonio Dávila, Juan de Dios Mayorga, Juan Francisco de Sosa, Francisco Márquez	Juan Esteban Milla, Francisco Quiñónez, Luciano Alvarado, Miguel Pineda, Toribio Argüello

Even though the *moderados* outnumbered the *liberales* nine to four, at least with respect to federalism, the *liberales* shaped the other parts of the draft constitution more than the *moderados* did. This outcome contradicts the reasonable expectation that Rafael Ariza y Torres' uprising would have strengthened the *moderados'* push for centralization. Shay's rebellion in the U.S. helped the centralizing efforts of those who sought to replace the decentralized Articles of Confederation. In both cases, proponents of centralization believed that a centralized government could more readily put down rebellions. With respect to other institutional choices, the changes from liberal to conservative in the course of the Assembly meant the adoption of more "conservative" institutions (Montúfar y Coronado:1963, 82), but this did not happen in the debate over federalism. Pablo Alvarado, a delegate from Costa Rica, wrote on November 3, 1823 that of the sixty four present at the votes over federalism, the *Bases*, and the Constitution, the *conservadores* outnumbered the *liberales* forty six to eighteen (Alvarado 1936; Lujan Muñoz 1982, 59).

The first triumvirate consisted of Antonio Rivera Cabezas (liberal), Juan Vicente Villacorta (liberal), and Pedro Molina (liberal). Manuel José Arce had not yet returned from abroad. When Antonio Larrazábal turned down the opportunity to serve as Arce's substitute, Cabezas took the position.

THE POLITICAL GEOGRAPHY OF CENTRAL AMERICA THEN AND NOW

Changes to the Size of Central America: 1821-1862

By both addition and subtraction, the current map of Central America does not match the political cartography of the region at the moment when it became independent from Spain in 1821. At some point between the moment of first independence in 1821 and the Federation's collapse in 1840—when every member of the Federation became an

independent country again—each of the other colonial units in Central America experienced some change in its borders. Panamá became part of Central America only after it seceded from Colombia in 1903. Chiapas did not permanently leave the other Central American political units until it decided in 1824 to become the southernmost state of México's new federation. Chiapas constituted the northernmost loss to the region's territories, while pieces of Nicaragua y Costa Rica constituted the southernmost territorial losses. Notwithstanding the continuing dispute between Nicaragua and Panamá over their provenance, both the present day Panamanian province of Chiriquí and the island archipelago of Bocas del Toro most likely properly belonged to Nicaragua; but Panamá (a part of Colombia at the time) permanently annexed Chiriquí and Bocas del Toro in 1836.

Central America also experienced internal boundary changes, and some of those intertwined with the changes of its external boundaries. The Province of Nicaragua y Costa Rica split into two different countries, Nicaragua and Costa Rica, on the eave of the federating process. Official control over Soconusco passed back and forth between Guatemala and Chiapas several times. It belonged to Guatemala from 1569 until 1786, when the Bourbon Reforms placed Soconusco within the Intendencia of Chiapas. In 1812, the Cortes de Cádiz centralized the governance of Chiapas (including Soconusco), Honduras, and El Salvador under the direct control of the Deputation of Guatemala.

The Restoration returned Soconusco to Chiapas in 1814. With the return of the Cortes de Cádiz in 1820, control over Soconusco reverted to Guatemala. But in 1821 the Cortes made Soconusco subject to Chiapas once again. In that same reorganization of its Central American colonies, the Spanish government, went so far, in fact, as to make none of the provinces subordinate to each other, effectively ending the *Reino de Guatemala*.

The Cortes also entrusted the Province of Guatemala with the governance of what had been the separate Province of El Salvador. When all of Central America reverted to the status it had before it became a part of the Mexican Empire, Soconusco seceded from the rest of Chiapas and eventually declared itself part of the Federation of Central America in 1824. In its 1825 Constitution, the state of Guatemala, within the larger Federation, explicitly incorporated Soconusco. Intermittently thereafter, México and Guatemala both disputed *de jure* ownership and fought militarily for de facto control until 1882, when they struck a formal accord whereby Guatemala permanently renounced its claims.

Over that same period, Central America lost part of its eastern coast to the British. Both the Spanish and the Central Americans interchangeably referred to that eastern territory as Belize or (Eastern) Honduras. The Spanish and British Empires had fought over that stretch of land since the Spanish discovered it. Spain had the strongest formal claim. But the British had far more settlers in Belize than the Spanish did, and their numbers grew rapidly. Rather than risk the Spanish expulsion of its irregularly settled colonists in Belize, the British did not make an official claim, during neither Spanish rule nor the first years after Central America's independence. From the birth of the Federation in 1824 until 1836, Belize remained part of Honduras and therefore comprised part of the Federation. Belize's *de facto* separation from Spanish Central America occurred in 1862, when the British wrested Belize from Comayagua y Honduras by force. Britain's success on the ground at that point retrospectively converted the formal claim that it had made in 1836 into the beginning of its *de jure* ownership of Belize. England rechristened its newest conquest "British Honduras." Belize would not regain its previous name or independence from the U.K. until 1981.

Preexisting Institutions and the Establishment of CAF

Part of the purpose of this case study consists in demonstrating the unimportance, at least in comparison to the importance of the borders present at the creation of CAF, of any of Central America's earlier internal and external borders. The insignificance of the Spanish Empire's repeated reorganizing of CAF's internal and external political borders contrasts with the decisive impact of the institutions present immediately before CAF's "coming together" federal moment; none of those extinct administrative arrangements mattered, no matter how long they had existed.

Those earlier political boundaries may have influenced the path toward the political borders that existed at the moment of federating, but only the final boundaries played a role in the constituent assembly, and many changes had taken place by then. CAF's shifting political borders after independence, moreover, only mattered if they still existed at the beginning of its federal moment. Nicaragua and Costa Rica, for instance, would have remained one integrated province if those earlier colonial institutions truly mattered. Guatemala, El Salvador, and Honduras would not have functioned as separate units at the moment of federating if the Cortes de Cádiz's 1812 reorganization of the region had survived. Whatever socially integrative effects any of those earlier institutional arrangements may have generated, they did not matter in the face of the influence of the institutions present when the federation formed.

The Evolution of the Colonial Administration of Central America

Well before its independence in 1821, the region's political geography went through multiple changes, with respect to both its internal political boundaries and the external administrative powers that oversaw its provinces (Pollack 2019). In 1535, Spain capped its sixteenth century conquest of Central America by placing most of it under the

rather extensive colonial jurisdiction of the Viceroyalty of New Spain. As the first of all of Spain's viceroyalties, New Spain included most of the present day United States, Alaska, and México. But the fact that all of Central America shared subservience to the government of the *Virreinato de Nueva España* did not mean that they shared the same *audiencia*. In 1520, only because no other *audiencias* yet existed, all of Central America belonged to the *Audiencia de Santo Domingo* by default. Not long thereafter, Spain divided Central America among the *audiencias* of México, Santo Domingo, and Panamá. By 1539, among the territories of Central America, only Honduras still belonged to the *Audiencia de Santo Domingo*.

Karnes notes that the division of Central America among three audiencias stemmed from their conquest by three different men (Karnes 1961, 8). Pedro de Alvarado conquered Guatemala and El Salvador between 1523 and 1528. From 1528 to 1543, Guatemala and El Salvador belonged to the new *Audiencia de México*. In 1524, Francisco Hernández de Córdoba, marching from Panamá, conquered Costa Rica and Nicaragua. Spain created the *Audiencia de Panamá* in 1538, and it initially included Honduras, Costa Rica, and part of Nicaragua. In fact, it extended all the way down to the southernmost part of South America. Gil González Dávila started the conquest of Honduras in 1524, and Francisco de Montejo finished it in 1537.

As the number of its colonists in the region increased, Spain rearranged the borders. In 1539, the King transferred the rest of Nicaragua from the *Audiencia de Santo Domingo* to the *Audiencia de Panamá*. That same year, the Spanish Empire's *Real Consejo de las Indias* freed Costa Rica from the oversight of the *Veragua* administrators in Panamá; in 1542 the Empire promoted it to the status of a *gobernación* with its own administrators. But this moment of autonomy did not last long. The Empire abolished the

Audiencia de Panamá in 1543 and transferred its territories to the two newly created *audiencias* of Guatemala and Lima. Then in 1568 the *Real Consejo de las Indias* made Costa Rica a part of the Kingdom of Guatemala. El Salvador (1579), Guatemala (1542). In 1569, the Empire transferred the *gobernación* of Soconusco from the *Real Audiencia de México* to the *Real Audiencia de Guatemala*.

Near the end of the Spanish American Empire, the geographic boundaries of the judicial (*audiencias*), military (*capitanías generales*), and administrative (*gobernaciones generales*) parts of government typically coincided. When the geographic reach of those governmental functions coincided and emanated from the same capital city, the Empire typically used the military term *capitanía general* to refer to them as one colonial government. Sometimes, as with Central America, the term *reino* could also serve this purpose. Oftentimes, in order to tie the governmental functions together, the chief official of this territorial entity would perform multiple roles: *capitán general* of the *capitanía general*, *presidente* of the *audiencia*, and *gobernador general* of the *gobernación general*. On the eve of Latin American independence, the Spanish Empire had divided the Viceroyalty of New Spain into five of these units. These five Captaincies General-cum-Royal Audiences (*Capitanías Generales* and *Audiencias Reales*) functioned as the territorial and bureaucratic unit immediately inferior to the government of the Viceroyalty of New Spain.

In turn, immediately beneath the jurisdiction of a Captaincy General-cum-Royal Audience, various types of government shared the more general title of "province." These included districts (*corregimientos*), towns or larger districts (*alcaldías mayores*), and governorships (*gobernaciones*). The term for the administrator of each type of political unit reflected the term for that type of political unit. *Corregidores* governed

corregimientos, *alcaldes mayores* governed *alcaldías mayores*, *gobernadores* governed *gobernaciones*, and after the Bourbon Reforms the *intendentes* governed the *intendencias*. The general term *provincia* had no corresponding term for the person who served as a provincial administrator.

The territories of Central America gained the status of "province" as the Empire organized it geographically. To become a province simply meant that the Empire had attached a name and geographic boundaries to a piece of land. Each province had to have a capital city. Nicaragua gained provincial status, with León as its capital, in 1527.

The first instantiation of the *Reino*, the *Real Audiencia de los Confines de Guatemala y Nicaragua*, extended from the Yucatán Peninsula down beyond the province of *Nueva Cartago y Costa Rica*. At the birth of the *Audiencia de Guatemala* in 1542, the capital of the province of Guatemala, *Santiago de los Caballeros de Guatemala,* became the capital of the new *audiencia*. In 1543, the Empire put the capital of the *Audiencia* in *Santa María de la Nueva Valladolid de Comayagua* (*Comayagua*) in present day Honduras. But then it moved it to another Honduran city, *Gracias a Dios*, in 1544. Finally, the Empire moved the capital to *Santiago de los Caballeros de Guatemala* in 1549.

Officially, the *Audiencia de Guatemala* included more than present day Guatemala, San Salvador, Honduras, Nicaragua, and Costa Rica; it also included the present day Mexican territories of Yucatán, Quintana Roo, Cozumel, Chiapas and Tabasco (Carrillo 1886, 165). In fact, even present day Panamá belonged to it. Yucatán belonged *de jure* to the *Audiencia* in 1543, but it did not *de facto* become part of the Audiencia until 1550. The Empire also reorganized Central America at the administrative level below the *audiencia*. It eliminated the *gobernaciones* of Guatemala, Honduras,

Chiapas, and Nicaragua. In effect, Spain removed the boundaries between these administrative units and folded them into the *Audiencia* as one piece. In 1553, Spain transferred the province of *Soconusco* from the *Audiencia de México* to the *Audiencia de Guatemala*.

In 1563, the King abolished the *Audiencia de Guatemala* altogether and transferred its territories to two other *audiencias*. The *Audiencia de Panamá* took Honduras, Nicaragua, and Costa Rica, while the *Audiencia de México* took Guatemala San Salvador, Yucatán, and Chiapas. The abolition of the *Audiencia de Guatemala* also meant the return of Soconusco to the *Audiencia de México*. In 1568, the King reestablished the *Audiencia de Guatemala*. It now consisted of the same territories that it included before its abolition in 1563, except for Yucatán. But only in 1569 did the Empire once again transfer Soconusco from the *Audiencia de México* to the *Audiencia de Guatemala*.

As the Empire evolved so too did the geography of its administrative apparatus. But to complicate matters further, the territorial boundaries of the judicial *audiencias* did not always coincide with those of the military-executive *capitanías*. From 1508 to 1539, the east coast of Nicaragua and Costa Rica belonged to the *Gobernación de Veragua*. It extended down the east coast of Panamá until it reached present day Colombia. Legal appeals from local courts in *Veragua* went to the *Real Audiencia de Santo Domingo* on the island of *Hispaniola* in the Caribbean. From 1527 to 1539, both also fell under the judicial umbrella of the. Costa Rica and the part of Nicaragua that did not belong to *Veragua* passed to a number of Audiencias: *Audiencia de Santo Domingo* (1527-1539), the *Real Audiencia de Panamá* (1539-1543), the *Real Audiencia de los Confines de*

Guatemala y Nicaragua (1543-1563), the *Real Audiencia de Panamá* (1563-1568), and finally the *Real Audiencia de Guatemala* (1568-1786).

Between 1786 and 1812, the Spanish Empire reorganized the region into five territories. The gradual introduction of the Bourbon Reforms created a transitional mosaic of old (e.g., *corregidores*) and new (e.g., *intendentes*) administrative institutions, that corresponded to territorial divisions of the Kingdom. Although governed by somewhat different levels of colonial administration, such as intendancy (*intendencia*), governorship (*gobernación*), district (*corregimiento*), and larger district *(alcadía mayor*), the Empire used the more general term "province" when referring to any of them.

The *intendentes* who severally governed the *intendencias* of Honduras, San Salvador, Guatemala, Costa Rica, and Nicaragua had some autonomy to make day to day decisions, but they answered to the Captain-General (Karnes:1961, 4). And he governed the entire *Reino* from its capital cities, Antigua Guatemala (1543-1776) and Ciudad de Guatemala (1776-1821). The local elites in Honduras may have had informal power over the *intendente*, for instance. But the Captain General had formal control over both that *intendente*'s employment and his administration of the *intendencia*. By taking away their links to the province that they governed, the Bourbon Reforms increased the provincial administrators' dependency on the Captain–General. Unlike their predecessors, the *intendentes* could not marry someone from their *intendencia*. They could not have lived in the *intendencia* before their posting there, and the Captain-General moved them frequently enough from one *intendencia* to another to render them itinerants. By the end of the Bourbon Reforms, moreover, most *intendentes* themselves came directly from Spain rather than from another Central American province or another part of the Empire.

In those rare instances when an *intendente* became a problem, the Captain-General had the means to remedy the situation. He did not need evidence of the *intendente's* insubordination, incompetence, or cooptation by the local elite in order to to remove him. The Captain-General could dismiss the *intendente* at will. But, of course, by using one of those explanations as a false pretext, the Captain-General could more effectively justify sacking the *intendente*. Just in case the colonial office in Spain, the *Real Consejo de las Indias*, raised questions, the Captain-General could legitimize his decision. Even those *intendentes* who had no intention of transgressing the Captain-General's wishes had incentives to anticipate them.

The Importance of the Last Set of Colonial Institutions

Only the ultimate set of Central America's inter-provincial borders carried over and became demarcations between the countries participating in the constituent assembly. Those political boundaries, rather than any earlier ones, decided the borders of the states that would constitute the Federation. Not until after the birth of the Federation did any city, town, or village attempt to secede in order to become its own separate country. Admittedly, many a city, town, or village declared itself in resistance to the capital of its province, but those sub-provincial insurgencies always intended to take over the entire province through force or persuasion.

Most of the Spanish American Empire broke up into *reinos*, *capitanías*, and *audiencias* rather than into the larger *virreinatos* or into the smaller *corregimientos*, *gobernaciones*, and *alcaldías mayores*. When a *virreinato* contained not just *capitanías*, *audiencias*, or *reinos* that it governed indirectly but also territories that it governed directly because they did not belong to a separate *capitanía*, *audiencia*, or *reino*, those

territories tended to stay in one piece after independence (e.g., Colombia). If a *virreinato* contained an *intendencia* or *gobernación* that did not belong to a separate *audiencia*, that province typically became its own country (e.g., Paraguay). The *Capitanía General de Venezuela*, which the Empire had carved out from the *Virreinato de Nueva Granada* in 1777, eventually became Venezuela. Quito (1563) The *Virreinato de Nueva Granada* of the Spanish Empire became *Gran Colombia* in an independent Spanish America, and it included both Colombia and Ecuador, in addition to Venezuela. Shortly thereafter, *Gran Colombia* split into those separate countries. Ultimately, then, the *Virreinato de Perú* fragmented geographically into separate countries whose new borders coincided with the last set of colonial boundary lines that the Empire had drawn between *audiencias*: Cuzco (1787), Charcas (1559), Lima (1543) Concepción/Santiago (1565/1605) Buenos Aires (1783), and Carácas (1786).

On the eve of independence, the colonial government of Central America consisted of roughly four layers: 1) *virreinato*, 2) *reino, capitanía,* or *audiencia*, 3) *intendencia*, and 4) *corregimiento*, *gobernación*, or *alcaldía mayor*. Above the *virreinato*, the Council of the Indies administrated the entire part of the Empire that existed outside of the Iberian Peninsula. Towns and villages, whether indigenous or European, belonged to *corregimientos*, *gobernaciones*, and *alcaldías mayores.* The towns, villages, and cities controlled not only the territory "incorporated" in the urban area. They also governed the land and populations in the "unincorporated" rural territory in the vicinity of the urban center. For this reason, scholars who study these governing arrangements often translate *corregimientos* and *alcaldías mayores* as "municipalities." In each part of the former Spanish American Empire, maintaining territorial integrity at the level of the *virreinato* proved impossible. For the most part, however, the newly independent Spanish

Americans kept their *reinos, capitanías,* and *audiencias* intact. This occurred in part because that second level of *reinos, capitanías,* and *audiencias* enjoyed some of the greatest discretionary freedom that any level had. The *reinos, capitanías,* and *audiencias* had more freedom from the *virreinatos* than the *provincias* had from the *reinos, capitanías,* and *audiencias*. Robert W. Patch notes that the differential in physical distance played a role in the difference in the degree of discretion:

Moreover, the further removed a place was from the center of Spanish legal power the more the local elite or governmental official was able to rule in an arbitrary, and frequently lawless, way. (Patch 2002, xvii). The last set of each colony's internal boundaries between city, town, or village played a role in Central America's separate decisions to declare independence and to join Iturbide's Mexican Empire. But the dearth of dissenting cities, towns, and villages during the constituent assembly meant that those decisions did not pit province against city. During the process of acceding to the Mexican Empire, only two instances of intra-provincial conflict took place. Anti-accession forces in San José, Costa Rica successfully took control of the country's governance but only after the country as a whole had already decided in favor of accession to the Mexican Empire. This victory, moreover, took place only after the Empire had fallen, thereby making the conflict moot. Elites in San Salvador protested against accession but did not take up arms.

On those two occasions, sub-provincial political entities, rather than provinces, did choose Central America's path. Jordana Dym accurately points out that the disagreements between cities within the same province played a significant role in destabilizing and ultimately destroying the Federation. She also notes that early in its existence, the Spanish drew towns and cities but not provinces on their maps, even

though the later existed just as officially as the former (Dym:2006, 8). The municipalities made all of the major decisions, but at the beginning of the Federation, those intra-provincial fault lines between cities did not prevent the provinces from negotiating and voting in the constituent assembly as entire provinces rather than as separate cities. CAF emerged from the process, moreover, consisting of five countries rather than of dozens of cities and towns. Dym observes that the Central American *Audiencia* was nearly the only one that did not maintain its integrity after gaining independence from Spain. In this way, even though intra-provincial conflict took place, those provincial borders proved their staying power. They meant something to their elites if not their entire populations.

Provincial Borders

The strength of the effect of those borders on the federalization process also becomes clearer if we pay attention to the ambiguous way in which the Empire used the term "province." The particular instantiations of the various colonial territorial institutions did not share the same level of importance economically, culturally, or demographically. Two *alcaldías mayores* could hold different levels of importance. One might constitute a province (e.g., Chimaltenango) while the other just a city within a province (e.g., Sonsonate). Some *corregimientos* mattered more than certain *intendencias*, and the various *gobernaciones* did not uniformly belong to the same particular rank in the hierarchy. This happened in large part because one type of territorial unit (e.g., *intendencia*) could extend over a larger area than another type of territorial unit (e.g., *corregimiento*), even though the former contained fewer inhabitants than the later. Both, the territorially large but demographically small *gobernación* of

Costa Rica and the territorially small but demographically large *alcaldía mayor* of San Salvador, had the status of a province.

By observing conflicting reports for the number of provinces, we see the ambiguous importance signified by the label "province." Present in Central America before, during, and after the Bourbon Reforms' redrawing of the *Reino*'s internal borders, Domingo Juarros (1752-1820) counted fifteen "provinces" in 1810 (Ministro 1964, 18; Juarros 1810, 37). Nine held the status of "large town" (*alcaldía mayor*). Guatemala contained Chimaltenango, Escuintla, Sacatepéquez, Sololá, Suchitepéquez, Totonicapán, and Verapaz while the Province of San Salvador included Sonsonate and San Salvador. Within Guatemala, the provinces of Chiquimula and Quetzaltenango held the position of districts (corregimientos). The military governor of Costa Rica, nearly an *intendente* in his powers, administered that *gobernación* as a third province. The intendancies of Ciudad Real (Chiapas), Comayagua (Honduras), and León (Nicaragua) rounded out Juarros' group of fifteen provinces.

And yet the Bourbon Reforms had supposedly consolidated those fifteen provinces into five intendancies. San Salvador included the districts of San Salvador, Olocuilta, Zacatecoluca, San Vicente, Usulután, San Miguel, Gotera, San Alejo, Sensuntepeque, Opico, Tejutla, Chalatenango, Santa Ana, Metapán, and Cojutepeque. The intendancy of Ciudad Real de Chiapas contained Chiapas, Soconusco, and Tuxtla. The regions of Comayagua and Tegucigalpa constituted the intendancy of Comayagua. Spain created an intendancy of León with five parts: León, Matagalpa y Chontales, El Realejo, Subtiava, and Nicoya. A military government still administered Costa Rica. Finally, the Governor General continued his direct control over the Province of Guatemala, comprising Guatemala, Quezaltenango, Escuintla, and Chiquimula.

The Spanish Empire announced the creation of the *Reino de Guatemala* in 1542 and established it in 1543. It included not only the territory that would form Guatemala, El Salvador, Honduras, Nicaragua, and Costa Rica, but also present-day Yucatán, Chiapas, and Panamá. But the countries that would form the Federation did not immediately belong to the same *capitanía general*-cum-*real audiencia*. In the early years of the Spanish Empire in the Americas, a province's *audiencia* changed frequently.

The Cortes de Cádiz and Central America

Various Spanish governments rearranged the borders within the region many times, and yet the short-lived borders of 1821-1824 mattered most to the federal moment that created the Federation of Central America. In 1812 the Spanish government, this time in the form of the Cortes de Cádiz, reorganized the Kingdom of Guatemala by consolidating five units into two. The Province of Guatemala absorbed Chiapas, Honduras, and San Salvador. The Cortes integrated the remainder of the region into a new Province of Nicaragua y Costa Rica. This decision ran counter to the Cortes' previous commitment to allow each of the now six provinces to send one representative to participate in the Cortes. Costa Rica had now separated from Nicaragua.

The Restoration of the Spanish Monarchy and the Administrative Map of Colonial Central America

With the overthrow of the Cortes and restoration of absolute monarchy in 1814, Spain transferred the supervision of the intendancy of the Yucatán from the Vice-Royalty of New Spain to the Kingdom of Guatemala. The monarchy also reinstalled the six separate *intendencias*, continuing to superintend them through the Kingdom of Guatemala. After reestablishing itself in 1820, the Cortes raised each of the intendancies

under the monarchy to the level of province during 1821. For the first time, San Salvador had administrative independence from the province of Guatemala. The earlier political boundaries proved temporary and unimportant, while the borders established in 1821 and present in 1824 proved decisive.

When the Kingdom of Guatemala dissolved, its political leaders at both the center and the periphery opted for administrative continuity in order to maintain political stability. After declaring independence from Spain on September 15, 1821, four of the five former colonial provinces retained not only the Kingdom's Governor General; they also kept in place the subordinate governor for each province: Guatemala, San Salvador, Comayagua y Honduras, and Nicaragua y Costa Rica.

From Colonial Institutions to the Institutions of Independent Countries

Having lived under the stability created by the external rule of the Spanish Empire, all of the provinces considered entering the future under the protective umbrella of some larger political entity. On August 28, 1821 the city of Santa María Comitán (Comitán) located in the province of Chiapas, as well as the towns and villages under that city's jurisdiction within the Spanish Empire, declared independence from Spain. Santa María Comitán took further steps on September 1, 1821, asserting its independence from the *Reino de Guatemala* and announcing its intention to join with the nascent Mexican Empire. Eventually, Chiapas' two major cities, Ciudad Real and Tuxtla, followed suit., They voted separately but on the same day, September 3, 1821, and then declared independence from Spain the following day. In those declarations, Ciudad Real and Tuxtla also announced their independence from the *Reino de Guatemala* and committed themselves to becoming part of Iturbide's Mexican Empire. San Salvador resisted

accession to México, but the captain general of the Kingdom of Guatemala invaded the territory, displaced its leadership, and made it part of the Empire.

By 1822, every province—except the Costa Rican part of the Province of Nicaragua y Costa Rica—had become part of the Empire of Mexico. Because of Costa Rica's distance from the capital, Guatemala had not quelled that rebellion as rapidly as it had crushed San Salvador's. The Costa Rican cities of San José and Alajuela rejected accession to Mexico. They forced the cities of Cartago and Heredia into rescinding their accession to the Empire by defeating them at the Battle of Ochomogo. News from the North arrived that the Kingdom of Mexico had imploded and relinquished sovereignty to the provinces. While this made Costa Rica's first civil war somewhat superfluousness, it also permanently moved the country's capital to San José.

Participation in the Empire by Nicaragua, Guatemala, San Salvador, and Comayagua y Honduras ended both because the Empire fell and because Emperor Iturbide formally allowed them to reclaim their independence. Had they stayed together, perhaps a "holding together" federal moment would have taken place. Instead, they briefly became their own individual countries. This development set the state for a "coming together" federal moment. During this same period, Costa Rica continued its existence as a sovereign country, having never joined the Mexican Empire. Even Chiapas spent time as its own sovereign state until deciding to rejoin Mexico in 1824 as one of the states in that federation. Chiapas chose to become a permanent part of México rather than participate in the Central American Federation. The remaining provinces stayed in this independent form from the time of their separation from Mexico until their creation of the Federation. And during the entirety of the existence of the Federation, the number of constituent federal units never changed permanently. Even when Los Altos broke off

from Guatemala and the Federation permitted it to become the federation's sixth state in 1838, Guatemala militarily reintegrated it in 1840.

The local populations referred to these future countries according to the names of their capitals: San Salvador (El Salvador), Comayagua (Honduras), León (Nicaragua), and Cartago (Costa Rica)

The first section illustrates how structural factors predicted the establishment of a centralized judiciary for the federation. The second section traces the process by which the institutions caused a decentralized judiciary.

PART III: THE STRUCTURAL CHARACTERISTICS OF THE CENTRAL AMERICAN FEDERATION

Part III describes the various factors that made Central America a least likely candidate for "coming together" federalization to create judicial decentralization. If they any effect on the outcome, Central America's structural features would have pushed it toward centralization in general and judicial centralization in particular. The presentation includes an analysis of Central America's structural features and how they would not have contributed to the disintegration of the region in any significant way. These features do include human characteristics that gradually changed between 1821 and the twentieth century (e.g., linguistic, ethnic, religious, economic). But they also include many physical aspects (e.g., geographic, geological, meteorological) that remained the same.

We should not underestimate Central America's structural heterogeneity and its other sources of disintegration (Stone 1983; Karnes 1961), but we should not overestimate them either. It is a mistake, for example, to overlook the importance of time. The seeds of fractionalization, which had fully blossomed into the stark differences easily observed by the twentieth century, had not germinated by 1823, if they had been planted

at all. By the twentieth century, the families that colonized the region were marked by their interconnectedness than by their differences (Stone1982; Stone 1983). Independent Central America manifested its greatest level of homogeneity in the early nineteenth century, and Central America's measure of internal similitude immediately after independence was high not just in comparison to later moments in the region's history.

National and Local Sentiment among and between Natives, Ladinos, and Criollos

Other structural factors, besides diversity and inequality with respect to characteristics such as wealth, language, and ethnicity, also increased the odds that CAF's federal arrangement would include a centralized judiciary.

Weak Insurrectionist Sentiment among the Native Indian Population

Any pre-independence rebellion or unrest by Native Indians would likely have continued after independence, complicating any attempt to unify the region, but the indigenous population had been peaceable during the colonial period. Central America's Native Indians constituted the majority of Central Americans. An asymmetry in military technology had certainly helped the Spanish Empire's few settlers and administrators dominate them. But disturbances such as the Mapuche uprisings in Chile (1655 and 1723), the Túpac Amaru insurrection in Peru (1781), and even the Comunero revolt by mestizos in New Granada (1781) meant that other factors played a role in the Empire's pacification of the indigenous population in Central America.

Jordana Dym points out that, just as it did in Peru, indigenous groups constituted over eighty percent of the Kingdom of Guatemala's population; yet no indigenous uprisings transpired that compared even remotely to Tupac Amaru II's rebellion in Peru (Dym 2006, xvii). Writing about the few rebellions in Chiapas and Guatemala, the

historian Robert W. Patch explains just how mildness of those revolts in comparison to the ferocity of insurrections in other parts of the Spanish Empire:

Colonial Yucatán and Guatemala, while having their share of riots, revolts, and rebellions, were never so rebellious or revolutionary as to require long-term and massive repression like that employed in the Andes and Mexico in the late colonial period." (Patch 2002, xix). The Maya, in short, were never as rebellious as many modern scholars would want us to believe." (Patch 2002, xix)

The Maya also found ways to turn the colonial regime against itself. They made appeals to the high court of Guatemala in order to undermine the authority of a troublesome local colonial official. They hired Spanish lawyers to speak for them and represent them in court. Knowing that the government relied on the taxes they paid, they relied on the government's need to resume payment of taxes; by doing so they contributed to the formation of a colonial state that was so dependent on the Maya for its own income that its was fiscally required to temper justice with mercy. (This was probably less true in colonial Peru, where the state acquired a large part of its income from silver production rather than from tribute.) (Patch 2002, xix-xix)

Ethnic Diversity

As with several of the other structural characteristics, CAF's measure of ethnic diversity should be understood in relative rather than absolute terms. Admittedly, indigenous and mestizo people constituted 82% of CAF's population (Anna 1984, 54), but the nature of electoral institutions prevented this divide from manifesting itself. Hector Pérez Brignoli estimates that 587,069 native persons resided in the region in 1800 (Pérez 1997, 107). Two alternative interpretations emerge from these demographic

statistics. On the one hand, Central America had minimal ethnic diversity because all but 18% of the population had some indigenous ancestors. According to Ralph Lee Woodward, Jr., "[a]lthough they spoke a multitude of languages, their common Mayan ancestry gave them a unity they have seldom recognized" (Woodward 1992, 5).

On the other hand, the term "indian" overgeneralized and erased the diversity among the multiplicity of Central American indigenous communities. The white criollo and peninsular populations represented a minority in each of provinces, even though that minority had smaller numbers in some provinces than it had in others. Some of the provinces, such as Costa Rica and Nicaragua, had smaller indigenous populations than others, such as Guatemala and San Salvador. Fewer Europeans resided in Costa Rica than in Guatemala, for instance, but Europeans comprised a larger percentage of the population in Costa Rica than in Guatemala.

The political boundaries of Central America helped neutralize the decentralizing effect of ethnic diversity. Not just one or two but multiple territorially concentrated groups lived within the borders of the same province. No single ethnic group numerically dominated any of the provinces or resided on land coextensive with the province's territory. Some of these groups also traversed the borders between one province and another.

Figure 5.1 - Ethnic Diversity in the Central American Federation

Source: Juan Miguel / CC BY-SA (https://creativecommons.org/licenses/by-sa/3.0)

Table 5.13 - Estimates of Ethnic Composition of Latin American Countries circa Independence

	% Spaniard or European	% Mestizo or Ladino	% Indians	% Black, Mulatto, or Pardo
México (1793)[a]	18.0	11.0	61.0	10
Peru (1795)[b]	12.6	21.9	58.2	7.3
Central Venezuela (1800-1809)[c]	25.0	10.0	13.0	52.0
City of Buenos Aires (1810)[d]	66.0	-	1.0	33.0
Cuba (1792)[e]	49.0	-	-	51.0
Central America (1810)[f]	4		64.7	31.3
Central America (1823)[g]	20	40	40	_
Central America (1824)[h]	4-5		60	30
Central America (1837)[i]	25	38.9	36.1	_
Central America (1841)[j]	6.5	44.5	50	_
Central America (1856)[k]	5	40	55	<1
Mexico (1842)[l]	14.3	28.6	57	<1
Nicaragua (1823)[m]	14.0	45.0	40.0	1.0
Bolivia (1846)[n]	48.0	52.0		-
Paraguay (1799)[o]				11.4

Sources: [a](Lockhart and Schwartz 1983, 342)[b](Aguirre Beltrán 1972, 234)[c](Fisher 1970, 253)[d](Lombardi 1976, 68)[e](Johnson and Socolow 1979, 345)[f](Martínez-Alier 1974, 3)[g](Lockhart and Schwartz 1983, 342)[h](Thompson 1829)[i](Lockhart and Schwartz 1983, 342)[j] (Galindo 1836)[k](García Peláez 1852, 224)[l](Squier 1856, 53)[m](Squier 1856, 53)[n](Mayer 1907)[l] (Dalence 1851, 222; González Saravia 1824, 8)[o](Lockhart and Schwartz 1983, 342)

The indigenous population played a significant role in the decisions to declare independence from Spain and to join the Mexican Empire, because the region made those decisions on a city by city basis. Natives and mestizos had influence over their city governments, especially in cities that had majority native and mestizo populations. But the indigenous population did not participate directly in the constituent assembly. They helped select their respective provinces' delegates, but none of them held a delegate's seat. Notwithstanding the diverse ethnic situation in CAF, white creoles made most of the political and institutional decisions during and after the war for independence (Karnes 1961, 6-8). In the wave of town, village, and city declarations of independence that started in September and ended in December 1821, the white elite leadership of the *cabildos* or *ayuntamientos* only made the decisions where they held a majority. In perhaps the most important instance, the Spanish Inspector General of the Army turned leader of the Central American provinces, Gabino Gaínza, convened the political, religious, and economic elites of Guatemala City where they agreed together to declare independence on September 15, 1821 (Karnes 1961, 19-20).

The November 1821 referendum to join the Mexican Empire did poll the smaller mestizo and indian villages among the total of nearly 200 villages, towns, and cities (Dym 2006, xx). Many cities, towns, and provinces had already declared their annexation to Mexico, either when they declared independence from Spain or sometime shortly thereafter (Karnes:1961, 19-23). Jordana Dym argues that the indigenous population influenced the decision to join the Mexican Empire because the small villages of the indigenous population formed *cabildos* and sent their votes (Dym 2013). Karnes notes:

Many of the results were never reported to Guatemala, and there was a strong minority opposing Mexican ties, but a substantial majority voted in favor of annexation to the Empire (Karnes 1961, 23).

Table 5.14 - Results of *Ayuntamiento* Votes, January 1, 1822

Position	Number of *Ayuntamientos*
Those in favor of union with Mexican Empire	104
Those in favor of union with Mexican Empire with some conditions	11
Those in favor of doing what the Provisional Junta decides	32
Those in favor of doing what the Congress decides when it meets on February 1, 1822	21
Those against union with Mexican Empire	2
Missing Votes	67
TOTAL	237
Source: (Valle 1924, 21-23)	

The count was not particularly fair or free. It did not include at least 67 *ayuntamientos*. Had the count given the *ayuntamientos* equal weight in the overall decision—even though they represented vastly divergent population sizes—the indigenous population would have had outsized influence. Guatemala City was ten times the size of many of the other *ayuntamientos*, and so it received roughly ten times the representation. Armed pressure to join the Empire was also present. Mexican troops had already arrived in Guatemala in order to "protect those who wish[ed] to join the Empire" (Karnes 1961, 23). General Gaínza declared that he would ensure the majority's will by force if necessary. And after the vote revealed a majority in favor of joining the Mexican Empire, Gaínza warned that he would not tolerate even the discussion of alternatives to annexation (Karnes 1961, 24).

While it is clear that the Indian population indeed did play some democratic role in these processes, it is not clear that the commission that counted the votes gave equal weight to indigenous ballots. According to Dym, the commission decided that a majority of the population rather than a majority of the villages, towns, and cities voted for annexation to México (Dym 2013). If the indigenous population's preference were decisive then this process would be an exception to the general rule in independent Spanish America. Typically, *criollo* elites controlled political decisions. Timothy Anna writes about Mexico that while:

> "the uprisings of the lower classes in 1810 and thereafter…are a distinguishing feature of the Mexican independence struggle, it would not be the lower orders, in México or anywhere else in Spanish America, who determined either the outcome of independence or the form the new states would take" (Anna 1984, 57).

Karnes concludes that neither the mestizo nor the Indian populations played a role in politics until the 1830s:

> Granted that most of these Guatemalans—Indians—played no part in politics, it would have to be assumed that such would be the case in each state. The extent of illiteracy was substantial in all of Central America, and the undoubted political disinterest of the Guatemalan Indian would be partly balanced by the equal disinterest of the *mestizo* in the other nations (Karnes 1961, 6).

Even before the wars for independence, there were signs that the indigenous population would not take a prominent political role. Several other former Spanish colonies with large and diverse indigenous populations did not even become federations. Bolivia, Paraguay, and Peru remained unitary systems.

If ethnic divisions can stimulate the adoption of decentralized federalism, then the ethnic homogeneity among the Central American Federation's economic and political elites meant the absence of ethnic heterogeneity as a cause of judicial decentralization. Decision-making was in the hands of a relatively ethnically monolithic creole elite rather

than in the hands of the mestizo and indigenous majority. It would be overreaching to conclude that the ethnic demography of CAF would have caused judicial centralization if not for the presence of a "coming together" scenario. Nevertheless, ethnic demography at least did not predispose Central America toward federal decentralization. With respect to ethnic diversity, Central America was one of the least likely places to see the emergence of a decentralized judiciary.

Karnes suggests that the provinces differed considerably in their ethnic compositions:

> The variations in ethnic composition of the states now, and it must be assumed, in the 1820's, were very great. Precise calculations do not exist, but a reasonable estimate would be that Guatemala is 70 per cent Indian and the balance white or *mestizo*. In Nicaragua and Honduras the majority of the people are mixtures of white, red, and to a lesser extent, black, coupled with very small quantities of pure strains of those same colors. El Salvador is almost completely *mestizo* and Costa Rica claims to be about 80 percent white. In this last state the pre-conquest Indians, peopling some of the highlands so densely that the Spanish had little real impact upon them. In the three middle provinces, the ratios of white to Indian were much closer, miscegenation was the rule, and only small numbers of either race could claim a "purity." (Karnes 1961, 7)

What difference did it make that not only was the entire Kingdom ethnically heterogeneous, but the provinces were also not identical to each other in their ethnic demographics? There are two ways in which the founders of the federation may have been concerned with these phenomena. First, they could have worried that voting would break along ethnic lines. Each of the various Indian groups would have its own representatives. Most of the Indian tribes did not exist in more than one province. The Indians would not have been the only ones to form parties along ethnic divisions. The Creoles, *peninsulares*, *mestizos* could have had their own separate parties that transcended provincial boundaries.

It is more likely that the founders thought that the elected representatives would look like them. They would consist of the few *peninsulares* still in the region, and only some of the *mestizos*, but the *criollos* would hold the majority of seats. The franchise would be extended to the peasants and Indians, but the economic control of these elites would enable patronage and vote buying. The Spanish provenance of the names, belonging to the signatories of the first and second declarations of independence, as well as to the participants of the constituent assembly, bears this out.

The second reason for which the founders might have factored in ethnic heterogeneity would have been concern with managing those groups. In creating the institutions of the federation, the drafters may have considered the fact that the people they were going to govern divided along tribal lines.

Population Sizes

The province of Guatemala had more inhabitants than all of the other provinces combined (Karnes 1961).

Table 5.15 - Population Estimates for the Provinces of the Kingdom of Guatemala (1824, 1820, 1808, 1778)

Province	1824[a]	1820[d]	1808[b]	1778[c]
Guatemala	660,580	595,000	363,000	318,092
El Salvador	212,573	248,000	240,000	146,684
Nicaragua	207,269	186,000	104,000	106,926
Honduras	137,069	135,000	93,000	87,730
Costa Rica	70,000	63,000	47,000	24,536
Total	1,100,948	1,227,000	949,015	805,339

Sources: [a](Facio 1949, 67; 1965, 65) cited in(Karnes 1961, 5), [b](Juarros 1808, 69-73) cited in (Ayala Benítez 2007a, 20), [c](Juarros 1808, 96), [d](Ayala Benítez 2007b, 20-21)

Language

The characteristics of a country's linguistic demography can influence the federalization process toward centralization or decentralization. Diversity in language can predispose a federal moment toward decentralization. At the very least, uniformity in language does not prevent centralization. In a "coming together" moment, the effect of language on the degree of centralization hinges on the language that the constituent assembly uses. CAF's constitutional convention took place in Spanish. It also mattered that the linguistic divisions among the provinces did not coincide with the borders between the provinces. Multiple indigenous languages concentrated in different parts of each province.

As with ethnicity, the decision-makers in Central America overwhelmingly spoke Spanish as their first language. The indigenous population spoke a plethora of dialects

and languages as first languages, and many if not most of the indigenous did not speak Spanish at all, but neither did they make the political and institutional decisions.

Religion

Territorial Size

Because it spanned territory roughly the size of only Wyoming and Colorado combined, Central America's geographic size predisposed it toward centralization, or at least did not stand in the way of judicial centralization. In the full universe of federations, past and present, CAF's size placed it equal to or smaller than both a number of unitary political systems and several federal systems that developed centralized judiciaries. Many of those unitary and federal countries, with territorial sizes comparable to CAF's, existed contemporaneously to CAF. This latter set of examples, therefore, overcomes the objection that succeeding improvements in transportation and communications, because they reduce the implications of physical space, leave no useful comparisons.

In Latin America alone, countries larger than the Central American Federation, such as Bolivia, Peru, Brazil, and Chile, developed unitary political systems during the aftermath of independence. Even though each of them was territorially larger than CAF, Spain, France, China, Russia, and Austria-Hungary maintained unitary political systems from the early nineteenth century through the beginning of the twentieth. A unitary state could govern so much land, even if the uniformly monarchical character of those cases suggests that a democratic state could not have done it. Notwithstanding the fact that not all of them occurred during the nineteenth century, a number of "holding together" federations adopted centralized judiciaries during their federal moments, even though they encompassed territories larger than CAF's The Russian Federation (1993), Canada

(1867), Brazil (1824), Sudan (1972), South Africa (1994), France (1982), Spain (1974), Kenya (1963), Indonesia (1949), Bolivia (2009), Pakistan (1954), and India (1954) had or have centralized judiciaries. At the very least, the Central American Federation's territorial size did not predispose it toward decentralization.

Table 5.16 - Comparing the Central American Federation's Territorial Size

Unitary Countries	**Area (km2)**	**Federations with Centralized Judiciaries**	**Area (km2)**
Russian Empire	22,800,000	Russian Federation (1993)	17,098,246
China	9,572,900	Brazil (1824)	8,515,767
Brazil	8,515,767	India (1954)	3,287,263
Peru	1,285,216	Canada (1867)	3,157,515
Bolivia	1,098,581	Sudan (1972)	2,505,813
Chile	756,102	South Africa (1994)	1,221,037
Austria-Hungary	681,727	Bolivia (2009)	1,098,581
France	640,679	Pakistan (1954)	881,912
Spain	505,992	France (1982)	640,679
		Kenya (1963)	580,367
		Spain (1974)	505,992
CAF	423,500	CAF	423,500

Broken Topography, Transportation, and Communications

As with evaluating the effects of Central America's other structural characteristics, properly assessing the difficulties for travel and communication that its broken topography generated involves viewing them in relative rather than absolute terms. The first step in establishing the relatively unfragmented nature of Central America's topography consists in admitting and describing its measure of fragmentation.

Only then can the second step explain its fragmentation relative to that of unitary countries and holding together federations.

In terms of measuring the brokenness of its topography, the Central American Federation had some mountains, but no more than a number of other unitary federal systems. Not only did the Spanish found their major settlements, cities, and capitals in the highlands rather than on the coast in all of the provinces of Central America. They also placed their smaller cities, towns, and villas in the corresponding highland in each province. Rather than weakening the links between population centers, the dispersal of cities, towns, and villages linked them together across long distances. Instead of having to traverse long distances without seeing any signs of civilization, as they had to do in other parts of Spain's America Empire, travellers in Central America rarely trekked very far before encountering another population center.

Communication between every two adjacent cities facilitated communication throughout the Kingdom. Mail stopped in each town along the way from the southern to the northern part of the *Reino*, but a region-wide mail system piggybacked on those more localized inter-urban mail systems. In contrast to the rest of Spanish America, the Kingdom had frequent mail deliveries and moved a high volume of mail because of the proximity of population centers.

Travel across the region, especially between the northern provinces and the southern provinces, presented difficulties but no more than those present in many unitary federations. During the rainy season from June until November, travel across the isthmus was prohibitively difficult (Karnes 1961, 11). Even in the dry season, the fastest travellers could only make one of the longest distances in the Kingdom—the 1,000 miles from

Guatemala City to Cartago in Costa Rica—in one and a half months (Karnes 1961, 11).

Woodward characterizes the absence of a network of workable rivers:

> Central America has no navigable rivers, although several streams, principally the Motagua and Polochic in Guatemala, the Ulúa in Honduras, the San Juan in Nicaragua, and the Chagres in Panama, have at times provided channels from the Caribbean into the interior. In most cases, however, they are not navigable as far up as the highlands, where the population centers are. The steep, Pacific watershed offers virtually no possibilities for navigation; there only the Lempa in El Salvador permits minor service. (Woodward 1999, 5)

> The dominant geographical feature of Central America is the imposing range of volcanic mountains which runs from Mexico through Panama. Rugged, wild, and shifting, these mountains present major obstacles to communication and cultivation, while at the same time they provide the elevation which assures much of the isthmus its eternal springtime climate. In the past, these mountains were bastions for the Indians, allowing them to resist their enemies; later the Indians' conquerors used them as forts against their European rivals. The volcanic cones which punctuate the spine of the isthmus reach their greatest heights in Guatemala, where Tajmulco is nearly 14,000 feet above sea level and many other volcanoes rise to more than 10,000 feet, and in Costa Rica, where several peaks exceed 12,000 feet. In several of the other states there are volcanoes over 7000 feet high. In Honduras, Nicaragua, and Panama, however, there are breaks in the chain, and for centuries Central Americans, lured by the potential profits of world commerce, dreamed of striking through them to create an interoceanic passage." (Woodward 1999, 4)

> Despite two long coastlines, neither shore offers good natural harbors, and the search for safe, deep-water anchorages met with frustration and defeat for much of Central America's history. On the Pacific coast, only Puntarenas and Panama City offered reasonable protection for shipping, and both had other shortcomings. Elsewhere, ports were simply wharves stretching out over the beach into deeper water. Although the Caribbean coasts offered better natural harbors, the tropical heat, marshy lowlands, and the concomitant diseases retarded port development there. Even those ports which did develop were little more than unsanitary outposts of the societies of the highlands, far from the dangers and the problems of the lowlands." (Woodward 1999, 5)

Numerous scholars have attributed high levels of broken topography to Central America:

> "The coming of rainfall in a single rainy season—often in torrential downpours—which is followed by long droughts, created additional problems for both production and communication. Streams which are either dry or no more than trickling brooks much of the year after heavy rains become deep, raging rivers, changing their course capriciously. The difficulty of road and bridge building under these conditions not only contributed to the isolation of the highlands from the rest of the world, but it even separated each province from the others. Central American products could not compete in markets they could not reach." (Woodward 1999, 8)

Economic Integration

Even before the Spanish conquest of Chiapas and Guatemala, the Maya had developed an economic system that networked villages to each other, trading in goods far beyond the local community:

> To understand the history of the Maya it is vital to take into account the productivity of agriculture. The technology may appear primitive to the modern observer, but it was effective, allowing agriculturalists to produce not only for their own subsistence but also a surplus that was channeled away from the producers through taxation and markets. Agriculturalists got government and cultural activities in return for civil and religious taxes, and goods (salt, flint, tools, etc.) in return for mercantile exchange. The productivity of maize also allowed the Maya time to produce cotton in addition to food crops. The raw cotton was eventually spun into thread and woven into textiles, which the Maya produced not only or their direct use but also to pay their taxes. Cloth was even used in commercial exchange as a kind of currency. Other forms of Maya money included cacao beans (small change) and jade (for high-value purchases). (Patch 2002, 5)

Relative to the standards of some other countries in the early nineteenth century, both economic integration and economic uniformity were middling in the Kingdom, but these factors were not low enough to predict federalism let alone judicial decentralization for the provinces that would form the Central American Federation. It was not economic

factors but political ones that prevented the Kingdom from continuing as a unitary country after independence.

The system functioned in roughly the following way:

> the small producers of añil brought their products to the local markets, if they could transport it. If they could not, they sold them to peddlers (*buhoneros*) or large producers, who had access to mules. In the local markets the first buyers would be large producers that counted on the droves of mules in order to make the journey to the large annual market in Guatemala. There they waited for the Guatemalan merchants, who were ready to play the triple roles of exporters of añil, importers of European manufactures, and lenders. The producers, after interminable bargaining, would leave the market with loans denominated in money or in imported or local products, all of which they received from the merchants. Upon returning to their localities, they became distributors for the merchants, selling in the markets or placing the merchandise with third parties. In this way, the luck of the Guatemalan merchants was intimately tied to that of the Salvadoran, Nicaraguan, and Honduran producers, and the markets were the scenes of the principal commercial transactions. (Lindo Fuentes 1993, 146-147)

If the moment of federating had happened in the seventeenth century, then the economic ties between the provinces would have been much weaker. Before the eighteenth century, it would have been true that the region was one in which most farming was subsistence and there was minimal extra-regional trade (Woodward 1985, 117). The intra-regional trade that did take place occurred between a farm and its nearest city within the same province. Previous to the Bourbon reforms of the eighteenth century, exports from the Kingdom of Guatemala found their way to Spain only by first going overland to the port of Veracruz in New Spain (Woodward 1985, 119).

The Bourbon economic reforms and the economic growth that they engendered brought greater economic integration. Costa Rica, for example went from being primarily a subsistence economy at the end of the eighteenth century—notwithstanding its small cacao exports—to a major exporter of tobacco (Woodward 1985, 119). This

improvement in tobacco output occurred at least in part because the Bourbon administration gave Costa Rica a tobacco monopoly (Fallas 1972; Meneray 1975, 244-256; Woodward 1985, 119). As Costa Rica moved from a subsistence economy to an export economy, it became increasingly integrated with the other provinces, especially Guatemala City. Woodward notes that, while the political components of the Bourbon Reforms increased the disintegration of the provinces, the economic aspects brought the Kingdom closer together (Meléndez Chaverri 1974, 115-125; Woodward 1966 p. xi-xii, 107-114; 1985, 121). In 1778 the *Reglamento y Aranceles Reales para el Comercio Libre de España a Indias* allowed a number of new ports to trade directly with Spain, but Puerto de Omoa in Honduras and the port of Golfo de Santo Tomás de Castilla (both on the Pacific side) were the only Central American ports added to Guatemala City's already existing ports (Haring 1949, 341). Notwithstanding this expansion, only the ports near Guatemala City could trade with ports in the other viceroyalties. As extra-regional exports grew so did the demand for intra-regional trade of commodities, such as food, necessary to the production of those exports. In 1800 almost 70% of the Nicaraguan province's $539,000 in exports had their final destination in one of the other provinces of the Kingdom (Lanuza Matamoros 1976, 87; Woodward 1985, 123). Van Oss describes how specialization and expertise caused intra-regional trade:

> But many other towns outside the capital also gained reputations for specialized branches of production: San Sebastián del Tejar was known for its tiles, used in the construction of houses, and Panajachel supplied the necessary ropes and nets for the fishing villages on the shores of Lake Atitlán. Furniture produced in Cobán, the capital of Verapaz, found its way to distant markets, as did the cotton and woolen textiles manufactured in San Pedro Soloma, to the north of Huehuetenango (Van Oss 1985, 38).

The change to an export economy across all of the provinces of the Kingdom also increased economic integration because it meant greater land use. Previously these lands had remained fallow or Indians used them for subsistence. Increased land usage increased the integration of the Kingdom's economy. The spread of coinage in the place of barter further integrated the region. Money enabled merchants, producers, and consumers to trade over longer distances because it was a less cumbersome means of exchange.

Inequality between the capital and regional capitals, on the one hand, and between the regional capitals and the interior *pueblos*, on the other, was not severe. According to tax receipts, the interior regions of the Kingdom were not backwaters in terms of economic production. They provided on average half of the Kingdom's tax revenues (Wortman 1975, 274). Until independence, most extra-regional exports (except for contraband) passed through Guatemala City (Wortman 1975, 255).

The royal government collected taxes from the exporters in the Kingdom's capital; only then could the exporter load ships at a port on either the Atlantic or Pacific coasts. Imports also had to come in through these ports and make a stop in Guatemala City (Wortman 1975, 273). Anyone intending to export his indigo, silver, cattle, cacao, or textiles to a port outside the *Reino de Guatemala* had to get these items to the capital. Ironically, in its attempt to monopolize trade from the Kingdom by allowing it to have only one location for both imports and exports, the Spanish Empire weakened its control, as piracy and contraband flourished. By clenching its fist too tightly around the isthmus' exports and imports, the Empire counterproductively squeezed much of the revenue through its fingers. If it had sanctioned more official ports along the eastern and western coasts, it probably would have collected more taxes. When the Napoleonic wars cut off all trade from the isthmus, the leadership of the Kingdom begged for the opportunity to

trade with the United States, but the Spanish officials superior to them demurred (Wortman 1975, 259). In 1819, the Captain General Urritia gave in to the merchants demanding free trade by opening all Central American ports to trade with England and its colonies (Wortman 1975, 278). Notwithstanding the decentralizing effects of this decision, it occurred only two years before the declaration of independence, not giving it enough time to dislodge the centralizing dominance of Guatemala City.

Producers could send their product from another port in the *Reino de Guatemala* to Guatemala City in order to get them to Cádiz, but this would be much more costly than sending them over land to the regional capital. The closer to the capital the location of production the less it made sense to first bring outputs to a minor port on the coast, paying someone to ship the products up the Pacific or Atlantic coastlines. At the ports on the Gulf of Honduras or Río San Juan the produce would again require shipment over land to Guatemala. After the trading was completed in the capital, the goods for which the producer had traded needed to return to the producer's home in his province. Again, the producer had the option of travelling by sea or by land, much in the same way that he had come to the capital. This trip to Guatemala City for the purposes of taxation was the case whether the product began its journey, for example, on the Pacific side and left the isthmus on the Atlantic side, or if it began its journey on the same side from which it left the isthmus. As the export economy grew, the demand for more ports in the other provinces increased. This inter-provincial trade over water did not substitute for transport over land, but rather it simply added to the overall amount of inter-provincial trade. Woodward notes the importance of Juan Bautista Irisarri in the development of these intermediary ports during the final fifty years of the eighteenth century (Woodward 1985,

123). The *Audiencia* in Guatemala saw to it that Costa Rica could not trade even overland with her neighbor Panama (Karnes 1961, 15).

By the end of the eighteenth century, Spain had ended Cádiz's monopoly on trade from Spanish America, and the Spanish colonies could trade with each other, but in the *Reino de Guatemala* only one port was permitted to trade with places outside the region. A port in Nicaragua could trade with a port in Costa Rica, but only Guatemala City could trade with Caracas, Cuzco, Buenos Aires, or Cádiz.

Guatemala City owed part of its centrality in the economy of the Reino to its possession of nearly all of the capital in the region. Any producer in the interior would have to obtain credit from a merchant in the capital if he wanted to buy tools or equipment (Wortman 1975, 255). Many merchants in the capital also had a stake in the interior and other provinces in Central America because they owned land in those places. There were merchants in the cities in the more southern provinces even in the seventeenth century (Woodward 1985, 117), but the economic growth of the eighteenth century increased the predominance of the merchants in the Kingdom's capital. Guatemala City's official monopoly on trade and unofficial monopoly on commercial credit tied the region together by tying each province to the center. Miles Wortman notes that the interdependence of the regions economies meant that the downturn in the value of exports from the capital affected the entire region's economy (Wortman 1975, 262).

Near the end of the eighteenth century, the Spanish government decentralized the tax system in the *Reino of Guatemala*. Now taxes would be collected in the interior rather than just in the capital. A chronological comparison of the *alcabala* (sales tax) receipts for the interior, on the one hand, and the capital, on the other, demonstrates the interdependence of the Kingdom's provinces (Wortman 1975, 256). Counterintuitively,

the regionalization of taxation actually increased the ties between the interior provinces and the capital; the local collectors had to send their collections to the capital so that the government of the entire *Reino* could send them to Spain. Guatemala City's position as the only transatlantic port made this occur.

This colonial interconnectedness depended on the Spanish government's bureaucratic supervision and insistence on the capital's extra-regional trade monopoly. But even after independence the effects persisted via inertia. Guatemala City remained the center of capital because the merchants lived there. Trade still flowed through the capital because it had the only existing space for large transoceanic ships. The bulk of fungible capital remained in Guatemala City after independence for at least two reasons.

First, the merchants were clustered there and had no reason to move south in order to lend their capital in the southern part of the region. They could continue doing business as they always had. Second, even if they wanted to move their capital south, it could not happen overnight. The merchants wanted to make certain that they would not be risking the loss of their capital in transit. It was one thing to loan the capital to someone else who would undertake the risks, but it was another thing entirely to do it oneself. If the borrower lost it in transit, he was liable for it, and the merchant could take his land at the same time that the merchant could redeem insurance on the loan. If the merchant lost the money, he might be able to redeem insurance on the loan, but he could only do this once, and the rates were higher because the merchant had no land to seize as collateral. Robert W. Patch observes:

> Chiapas exported some cloth to New Spain, but most of its textiles, as well as those produced in Guatemala, were exported to Santiago de Guatemala (the capital of the Kingdom of Guatemala), to the indigo-producing regions of El Salvador, and to the mining camps in Honduras. In this way the Maya area was

> incorporated into the major American export economies and hence into the world economy. (Patch 2002, 9)

CAF was no more economically diverse than Peru, Ecuador, or Chile, each of which adopted unitarist systems of government. Territorially larger federations tend to have more diverse economies because of variations in attributes such as climate, topography, and soil quality. Nevertheless, a number of these territorially larger federations did not adopt decentralized judiciaries. These include the Russian Federation (1993), Canada (1867), Brazil (1824), Sudan (1972), South Africa (1994), France (1982), Spain (1974), Kenya (1963), Indonesia, Bolivia (2009), Pakistan, and India (1947-1950).

During the sixteenth century, Spain sent a flotilla of two armed ships each year to the port of Caballos y Trujillo in the province of Honduras (Acuña Ortega 1980, 7). These flotillas did not proceed directly from Spain to the Reino, but rather, they broke off from a larger flotilla that made the journey to New Spain. In 1633 Spain ended the custom of automatically separating that smaller flotilla bound for Honduras from the lager flotilla headed for New Spain. Beginning in 1620, Spain's colonies experienced an economic crisis, and the flotilla to Honduras now rarely justified its cost. When the merchants of Seville wanted to trade with the Central American provinces, the flotilla took place, but the Reino could no longer depend on a regular opportunity to export to or import from Spain. This meant that between 1639 and 1659, Central America had almost no commerce with Spain. Until the first decades of the eighteenth century, in fact, nearly all trade between the Reino de Guatemala and Spain took an indirect route through the port of Veracruz. Once they reached this Mexican port, Central America's exports and imports made the rest of the journey over land. While the necessity of land travel did not end the circulation of goods with Spain, it retarded it considerably.

But the Empire's limits on Central America's extra-regional included more than just its transatlantic commerce with Spain. Central America had permission to trade with Cuba at least as early as 1630, but in 1676, the merchants of Seville convinced the Empire to outlaw this trade route a temporarily for only five years. But the Empire repeatedly renewed this five year ban, making it formally permanent around 1709. As with its other decrees regarding trade, whenever it deemed it appropriate the Spanish Empire freely violated this restriction on an ad hoc basis, but these exceptions did not prevent the formal rule from having almost all of its intended effect. The few records of ships permitted to violate the restriction (two in 1676, one in 1678 and 1681) should not be equated with any measurable erosion in the enforcement of Spain's mercantilist policy for Central America, let alone taken as evidence for the claim that Spain never enforced the rule.

At the beginning of the eighteenth century, Central America could trade with Panamá and Nueva Granada (Colombia and Venezuela). More specifically, ships travelled between the port at Lago de Nicaragua-Río San Juan in Nicaragua to the ports of Portobello and Cartagena. These ports in South America, like Veracruz in North America, provided a way for Central America to maintain trade, albeit indirect, with Spain. But the near ban on trade between the Viceroyalties of Perú and New Spain eliminated a potential source of Central American interconnectedness with the rest of the colonies. Ships surely passed between Central America and ports in both Perú and New Spain, but more ships would have made those routes if the Empire had permitted greater trade between New Spain and Perú. According to Spain's rules, neither the same ship nor its goods could leave Perú (or Veracruz), make a stop in Central America, and then proceed to Veracruz (or Perú). New Spain could not export to Perú the good that it has

imported from the Philippines. Perú could not export precious metals to New Spain. Spain only permitted trade between Perú and New Spain to consist in their domestic products, and that trade could only involve three ships a year of between three hundred and four hundred tons each. In 1634, the Empire cut the number to one ship per year. Two years later, Spain prohibited trade between Perú and New Spain entirely. This rule stayed in vigor at least until 1674.

Most of all, the merchants in Seville used the Spanish government to prevent New Spain, Central America, and Perú from becoming intermediaries between Seville and each of those colonies (Acuña Ortega 1980). Trade between Central America and Perú could consist of only two ships a year, and none of those goods could have originated in the Philippines or Spain's other Asian colonies. As with any of Spain's trade prohibitions, the Empire made it own ad hoc exceptions, and contraband took place. But the restrictions reduced the level of trade considerably. We know this in part because of both the economic downturn they created for the Spanish Empire and the economic growth that they unleashed when they ended. From roughly 1660 to 1704 the Empire permitted maritime trade between Central America and New Spain of domestically-produced goods. But after this point, Spain permitted the regions to only trade over land. In order to prevent the illicit trade of them from New Spain to Peru, goods from Asia could only enter Central America over land. The merchants in Seville put this "land only" rule in place also to artificially increase the price of the Asian imports to Central America that would compete with their exports to that region. New Spain could send Spanish goods to Central America over land, but Central America could not send Spanish goods to New Spain at all.

At first glance, some economic developments in Central America during the pre and post independence periods seem to contradict one another, but on closer inspection they all reinforced the economic integration of the *Reino*.

- Increased extra regional trade focused on Guatemala City and its nearest ports linked the other provinces to each other by linking them all to the capital.
- Extra-regional trade drove demand for inputs and factors of production for those exports, increasing intra-regional trade.
- The monopoly and later predominance of extra-regional trade in Guatemala City linked the provinces together because almost all of the merchant class and its sources of credit existed there.
- The administrative centrality of Guatemala City, especially for taxation, brought producers and consumers from across the Reino to the capital.
- The limited imports that arrived in Guatemala City connected purchasers in the other provinces with the capital.
- The limited amount of imports meant that, aside from those consumers who could afford the high prices, others who desired these products created a market.
- Increased demand for alternatives to Spanish imports led to specialization among the provinces, increasing intra-regional trade.

The Locations of Native Populations

In what came to be called the *congregación* or *reducción*, the Spanish moved the Indians to increase the density of their populations. Even though the ostensible reason for this concentrating of the native population was their Christian evangelization, this process made it easier to count, extract tribute from, and control the labor of the Indians (Lovell 1985, 76). The permanency of the increased density in population was uneven in Central America, and by the late eighteenth century in some places as many as three out of four Indians had returned to their dispersed farms, but the process left some long-term effects (Lovell 1985, 86-89). The process of congregating the native population was reiterative. The same Indians who would escape to their farms were those whom the Spaniards

forced back to the villages on repeated occasions. The mere formation of the villages meant greater interconnectedness both within a province and between provinces. Living in closer proximity to each other, albeit oftentimes only temporarily, also familiarized variegated Indian groups with each other and with their various locations.

CONCLUSION

In order to illustrate that even structurally homogenous "coming together" federations adopt decentralized judiciaries—this chapter examined the case of the Central American Federation. It detailed the institutions of the Federation's judiciary. The chapter then traced the process through which the leaders of the countries of Central America selected institutions for the federation. The discussion also outlined the evolution of colonial Central America's various administrative, territorial, and geographic arrangements. It showed that the institutions present at the founding of the federation, rather than any previous arrangements, decided the nature of CAF's judiciary. Finally, the chapter demonstrated that Central America exhibited structural homogeneity that should have otherwise led to a centralized judicial system.

PART THREE

CASE STUDIES II

"HOLDING TOGETHER" FEDERATIONS THAT ADOPTED JUDICIAL CENTRALIZATION

In this connection, we have to realise that the Constitution, so far as the Indian States are concerned does not rest upon the Covenants. The Covenants have value only to the extent they have been embodied or recognised in the Constitution. The integrity of India does not depend upon the covenants which have been agreed to by the States Ministry with the other States. They were only preliminaries to persuade them to come into the Constituent Assembly. When once the Constitution comes into existence, all these covenants derive their authority only from the Constitution. It is the Constitution that is the supreme and fundamental law. There is no provision whatsoever for any kind of severance of any part of India as defined in the Schedule except through the process of amending the Constitution itself. Therefore, only the people of India as a whole can allow any part of India which has been included in the Schedule to go out of India. Without that, no part by its own will can ask for any kind of severance or separation. That is a great thing.

–Shri K. Santhanam[67]

…the Federation was not the result of an agreement by the States to join in a Federation…

A federation being a dual polity based on divided authority with separate legislative, executive and judicial powers for each of the two polities is bound to produce diversity in laws, in administration and in judicial protection. Up to a certain point this diversity does not matter. It may be welcomed as being an attempt to accommodate the powers of government to local needs and local circumstances. But this very diversity when it goes beyond a certain point is capable of producing chaos and has produced chaos in many federal states. One has only to imagine twenty different laws—if we have twenty states in the union—of marriage, of divorce, of inheritance of property, family relations, contracts, torts, crimes, weights and measures, of bills and checks, banking and commerce, of procedures for obtaining justice and in the standards and methods of administration. Such a state of affairs not only weakens the state but becomes intolerant to the citizen who moves from state to state only to find that what is lawful in one state is not lawful in another.

–B.R. Ambedkar[68]

---

[67] (India 1949a, 719)

[68] (India 1949b, 43) Speech by B. R. Ambedkar, Constituent Assembly of India, September 16, 1949, in CAD, 9:1588.

Chapter Six

Creating the Republic of India: One Federal Moment or Two?

INTRODUCTION

A Puzzle Looking for a Solution: Why did India's High Levels of Structural Diversity Not Cause it to Adopt a Decentralized Judiciary?

Notwithstanding its plenitude of non-political predictors for political polycentricity, independent India's new Constitution established a federation that epitomizes centralization. Structural diversity such as India's linguistic heterogeneity, economic inequality, and topographical variation unquestionably played a role in India's emergence from its founding moment as a federation. But the devolutionary character of India's federal moment influenced its founders to adopt a centralized federal constitution that entrusted state governments with minimal legislative and executive power. Because they drafted their constitution during a process of "holding together," the constituent assembly's members chose a high level of centralization for India's judiciary too. But they centralized the judicial branch even more thoroughly than they had the other two branches. In fact, India's founders endowed its political system with a hierarchical, centrally-controlled, unitary judiciary. The constituent assembly did not confer any control over the judiciary to India's state governments.

Why India Emerged with a Centralized Judiciary

India adopted a centralized judiciary because of the nature of preexisting institutions: its extant unitary judicial system in the provinces and the central government's complete unitary control over the entire country. Under other circumstances, the existence of the princely states as autonomous political units after independence would have increased the likelihood that India experience only a moment of "coming together." But several countervailing developments emerged because of the nature of preexisting institutions. Those factors made India's ultimate federal moment

into one characterized by "holding together": 1) the dominance of the centralized provinces in the constituent assembly's balance of power, 2) the ability of the provinces to negotiate as one unitary bloc, 3) the reorganization of the princely states that removed their autonomy and judicial prerogatives, and 4) the preexisting unitary judiciary of the provinces.

The Indian government's *White Paper on the Integration of the States* succinctly explains what happened in the constituent assembly. With respect to the debates about the judiciary in the constituent assembly, the princely states lost the ability to negotiate for maintaining their autonomous judiciaries. In advance of the adoption of the new constitution, they had already surrendered their autonomy to the interim government:

> The original draft of the Constitution differentiated between the States and the Provinces as regards the jurisdiction of the Supreme Court and did not define the constitution of the High Courts of the States. The Constitution as finally adopted removes this disparity and integrates the judicial systems of the Provinces and States into one coordinated system. (India 1950, 119)

The provinces outweighed the princely states in a plethora of relevant characteristics, including population, territorial size, and GDP per capita. The various non-institutional ways by which the provinces dominated the princely states certainly played a role in making India a more centralized federation. These structural inequalities between the princely states and the provinces surely tipped the balance of power in the constituent assembly to the centralizers. But institutional factors also influenced the balance of power, both by shaping the desires of delegates and making certain institutional changes more difficult. Familiarity with and vested interests in the unitary nature of the country's judiciary, for example, predisposed the delegates from the provinces to favor judicial centralization. The preexistence of the unitary judiciary made it more difficult to change.

Structural inequalities make the governor's provinces' domination of the federal moment seem obvious, but the dominance of one faction at a constitutional convention does not change a moment of "coming together" into a moment of "holding together." The nature of a federalizing process has the strongest effect on the balance of power in the constituent assembly's negotiations. "Coming together" moments characterized by low levels of geographically linked structural diversity tend to decentralize more than "holding together" moments defined by high levels of geographically-related structural diversity. Analysis of other federal moments reveals this proclivity, even though India's single example does not demonstrate it.

Table 6.1 - Wealth, Population, Territory, and Number of Delegates in 1948

Political Units at Independence	Population	Government Revenue (rupees)	Area (mi2)	Number of Delegates at Constituent Assembly
Governor's Provinces and Chief Commissioner's Provinces	259,678,000	6,181,205,000[69]	684,609	229
Princely States	93,442,642		584,610	70

The structural dominance of the provinces, furthermore, does not explain why the constituent assembly devolved executive and legislative but not judicial power. Dominance in quantitative measurements therefore cannot serve as a substitute for inspecting the overall federating process.

[69] Statesman's Yearbook 1949 pg. 135-136

The Centralization of India's Legislative and Executive Powers vs. the Centralization of its Judicial Power

A comparison of the legislative and executive prerogatives held by subnational governments in centralized and decentralized federations, reveals that India's states wield less power than them by a matter of degree; but comparing the centralization of India's judiciary with that of other federations evinces a difference of kind. Chapter Two explained that near universal dichotomy. The judicial branch exhibits binary variation, while both the legislative and executive branches manifest ordinal if not continuous variation. Subnational legislatures vary both in how much they can tax property and whether they can tax it at all. Governorships differ from each other both in how long their executive decrees last without legislative approval and whether they can issue decrees at in the first place.

Bharat's states have their own legislatures and executives but do not have their own judiciaries. The central governments of some federations refer to the inferior courts of the national judiciary according to the name of the specific state where particular national judges do their work; the name of that specific state sits affixed to the entrances of the central government's court buildings. But those judicial systems belong to the national government. "Holding together" and "coming together" constitutional conventions manifest mutually exclusive outcomes: the existence or non-existence of state-level judiciaries. Bharat does not stray from this pattern. With respect to the judiciary, India's constitution reflects its "holding together" origins rather than its structural diversity.

A Preview of this Chapter

The preceding Introduction, Part One of this chapter, proposed an account of India's centralized judiciary that attributes its adoption to the preexistence of certain

institutions. Part Two puts forward a way to resolve the mismatch between the multiplicity and intensity of India's territorially linked diversity, on the one hand, and India's centralized judiciary, on the other. Part Three details India's judicial institutions in order to illustrate the extent of their centralization. Part Four puts forward reasons for the temporal scope of the chapter's analysis. The time period includes more events than those immediately preceding Bharat's constituent convention. By expanding the time period, the discussion can more carefully compare the causal power of the institutions in place right at the moment of federating, on the one hand, with the potentially path dependent effects of a nearly half-century's worth of antecedent institutional arrangements, on the other. But choosing a periodization for the analysis does not specify the periodization of the federal moment itself.

Part Five therefore explains the importance of properly identifying the beginning and end of India's federal moment. Part Six builds on Part Five. It makes the case for the existence of two Indian federal moments by outlining the major steps of those two distinct processes of federalization. The discussion in Part Six also considers the merits of two alternative characterizations of India's federal moment before it rejects both of them. India went through its first federal moment when the princely states joined the governor's provinces; a "coming together" moment left the princely states' independent judicial systems intact. The interim central government then turned that hybrid—of federalism for the princely states and unitarism for the governor's provinces—into a unitary state. India's constituent assembly continued, and the interim government ruled the country with a unitary state apparatus. But India experienced one more federal moment before the constitutional convention ended. And because the second and final federal moment of the constitutional conference involved devolution, India's Constitution endowed the country with a unitary judiciary. But the nature of each federal moment depended up the

institutions that constituted the ways in which India's political units related to the center, before both the first and second federal moments.

For that reason, Part Seven sketches the categories of the colonial political units that eventually constituted the independent Union of India. It places each political unit according to the nature of its attenuated autonomy from the Raj. Making the distinction between integrative and devolutionary federating processes depends upon identifying the relationship each political unit had with both the distant metropole and the Empire's local proxy. But distinguishing between political units only constitutes the identification of the building blocks in the process.

Part Eight therefore describes the evolution of India's institutional arrangements chronologically from 1919 until 1946, when Britain's transfer of control to the Indian government began. Part Nine walks through the steps that India's central government took to bring the princely states into a federal relationship with the still centralized provinces, creating a hybrid of unitarism and federalism. Part Ten explains how the interim central government turned India into a unitary state by merging princely states with each other, folding princely states into existing provinces, and turning other princely states into centrally administered areas. Nearly all but not every princely state followed one of these paths to submission to the unitary central government. Part Eleven therefore presents a few unique cases—Jammu and Kashmir, Junagadh, and Hyderabad—that involved the use of force, what Stepan calls "putting together" federalism (Stepan 2001). Their experiences, although in some ways different from those of the other princely states, do not differ in any respects meaningful to the argument.

The discussion then turns to the constituent assembly itself. Part Twelve examines the process at the level of the forest, whereas Part Thirteen delves into the process at the level of the trees. It takes a look at what "coming together" and "holding together" meant

for the election of delegates to the constituent assembly and the different ways in which princely state and provincial representatives participated. Part Fourteen explores how the convention's members debated which judicial institutions to incorporate in the Constitution.

A demonstration of India's "federalness" would clutter the earliest parts of the chapter with a background assumption established *en passant*. But even as the chapter nears its conclusion after Part Fourteen, both the understanding reader and the skeptical critic may remain justifiably unconvinced of India's good standing as a federation. Part Fifteen therefore illustrates why India does indeed qualify as a federation. After identifying and then conceding many of the ways in which India does not exhibit federalism, the discussion explains how the executive powers of the states make India a true federation. Part Sixteen concludes the chapter by briefly rehearsing the dissertation's argument and applying it to India in the context of other "holding together" federations.

This chapter's central goal consists in demonstrating this dissertation's theory by presenting evidence in the form of a case study: India's adoption of its independence Constitution. India serves as a "crucial case." The "holding together" federal moments of other countries overcame significant measures of structural diversity, but the strength of India's cleavages surpasses them all. If any "holding together" federation could have given rise to a decentralized judiciary because of the disintegrative power of structural diversity, India would have. A cursory look at India's federalization suggests a complicated mess of inextricably intertwined "holding together" and "coming together" processes. In the process of unpacking an explanation for India's centralized judiciary, this chapter also untangles those events.

THE IMPORTANCE OF STRUCTURAL HETEROGENEITY TO INDIA'S FOUNDING MOMENT

India's Myriad Diversities

With respect to both human and non-human structural characteristics, India (Bharat)[70] comprised at the time of its independence from the British Empire—and remains today—one of the most heterogeneous countries in the world. The variety of India's languages (Robinson and Ensign 2010; Bhatia 2008; Kidwai 2008), ethnicities (Muni 1996), and religions has long had few competitors among the countries of the world (Kim and Singh 2016). Crucially for its formation as a federation, many individuals identified by one or more of these characteristics lived together as geographically concentrated populations at the moment of independence (Schwartzberg and Stoddard 1995). In other words, India contained territorialized—and not just abundant—demographic diversity.

But India's heterogeneity includes much more than its demographic characteristics. The sheer immensity of its landmass (over 3.2 million square miles) enables India to encompass a topographic and climatic array of deserts, mountains, plains, forests, and coasts (Spate and Learmonth 2017, 825). Separated from each other by long distances and clustered regionally, India's natural factor endowments (e.g., minerals, arable soil, hydrocarbons) add to the country's territorialized diversity (Blyn 1966, 98). These fundamental human and non-human aspects of India's heterogeneity interacted with each other, human agency, and time. These processes added geographically-based secondary disparities such as economic, educational, and social

[70] For the sake of variety and because the Republic gave each of them official recognition in 1950, I use India's Anglicized name (India) interchangeably with the English transliteration of its Sanskrit name (Bharat).

inequality. Because those secondary characteristics varied according to location, contributing even more layers of geographically linked dissimilarity among India's states.

Why Care about Structure if We Can Already See that Institutions Matter Most?

Highlighting India's structural heterogeneity underscores the power of preexisting judicial arrangements and the "holding together" process to produce judicial centralization. This chapter contrasts the ability of India's structural cleavages to cause the constituent assembly to adopt federalism, on the one hand, and the inability of those cleavages to give India a decentralized judiciary, on the other. The same factors, that prevented the delegates from adopting unitarism and forced them to devolve executive and legislative power, could not convince the constituent convention's members to empower states with their own judiciaries. The delegates knew that the strength of India's inter-state diversity behooved them to mollify local elites by granting them some of the elements of governance. These included elected positions in local governments, the power to write legislation, and the ability to execute their own budgets. The central government did not think that it needed to devolve judicial power to the states in order to satisfy the relevant local political and societal elites. The national government also did not want to relinquish the centralized judiciary's ability to monitor and control the states.

Structural Diversity, Geographic Cleavages, and the Mutual Reinforcement of Territorialized Fault Lines

Increased diversity in any particular structural characteristic predisposed India toward federalism and decentralization, but only if that trait had combined with another specific category of demographic structural diversity: location. The mere fact that two populations of Indians live in two different states, such as Uttar and Madhya Pradesh, does divide those populations from each other, but only in that one way. If the two

populations' demographic characteristics (e.g., Sikh religion, Brahmin caste, Hindustani language) match, that homogeneity weakens geography's disaggregating effect. If you share three traits with someone it matters less that the person does not live near you. You share kinship with and simultaneously relate to that person religiously, culturally, and linguistically.

Any two types of demographic diversity divide more effectively when "coupled" than when separated. When "identities" such as language and ethnicity exist in tandem, they mutually intensify their respective abilities to fractionalize a population. But only the addition of "place" as a form of structural diversity will make any characteristic relevant to federalism. That the characteristics of two populations uniformly diverge from each other will not implicate federalism if the individuals within those two populations live evenly interspersed among each other. As their locations become more concentrated, the demographic differences between them more effectively disintegrate their tie to each other.

India Has Many Cross-Cutting Cleavages, But It Also Has Many Cleavages that Coincide with Geographic Boundaries

Scholars frequently contrast India with countries, such as Nigeria, that contain a greater number of coinciding cleavages. But India's fractures did and still do significantly affect its federalism. Admittedly, India's population has fewer coinciding cleavages than do many territorially smaller political systems, and India's many cross-cutting cleavages strengthen the integration of its national population. But importantly for federalism, India's strongest cleavages exist because they combine human or other characteristics with geography. Many of India's minority groups only concentrate in certain states and regions. Language, ethnicity, and religion often cross-cut each other in India, but the

people with any given individual characteristic frequently live in the same places. Hinduism may dominate the country overall, but Christianity predominates in Arunachal Pradesh, Meghalaya, Mizoram, and Nagaland; the majority of Indians in Lakshadweep, Jammu, and Kashmir practice Islam. English and Hindi may serve as India's most "universal" languages, but almost every state has adopted its own unique official language.

Institutions, Bargaining in the Context of a Balance of Power, and the Geography of Structural Diversity

When the delegates to the constituent assembly had to deal with the institutions that already existed before India adopted its independence Constitution, those institutions constrained the disintegrative effects of structural diversity. The devolutionary nature of the process muted the influence of those differences, permitting and nudging the founders to endow India's political system with weak states that do not even have their own judiciaries. The executive and legislative branches of India's states have far fewer taxing, spending, and regulating prerogatives than their counterparts among "coming together" federations, such as U.S. states, Argentinian provinces, and Swiss cantons.

Centralizers and decentralizers bargained with each other over the nature of Indian federalism during India's constituent assembly, but the centralizers dominated the process. The "holding together" nature of the process neutralized any group's threat to remain separate from the Union. During a "coming together" federal moment, choosing to forego participation in a new federation means no more than declining to join something new. But refusal to participate in a "holding together" moment signifies nothing short of secession. Because they cannot threaten to leave the federation credibly, during a moment of "holding together" decentralizers do not have the leverage to insist

on powerful subnational legislative and executive branches, let alone a decentralized judiciary.

Some scholars even contend that India's centralization puts it outside the club of federations. The national list of legislative prerogatives dwarfs the state list, and national law preempts state law whenever a conflict arises related to a subject on the concurrent list. Subnational legislation must secure the center's approval in order to become law, even when enacted well within one of the exclusive policy domains reserved for state governments. Predictably, as a "holding together" federation Bharat exhibits greater degrees of executive and legislative centralization than those typical to "coming together" federations. India's subnational governments make its political system federal only insofar that they have some executive powers that they can truly use autonomously from the central government. Hence India's states do have legislatures with attenuated legislative power, on the one hand, and those legislatures choose cabinets that exercise bona fide executive power, on the other. To accomplish this chapter's aim of illustrating how "holding together" overcame structural diversity to confer judicial centralization, the next section chooses a time period for analysis and justifies that choice.

THE INSTITUTIONS OF INDIA'S CENTRALIZED JUDICIARY

India's founders constructed a judiciary that centralizes all three levels of the courts that the Constitution mentions. The arrangement centralizes the Supreme Court, High Courts, and District Courts in all of the three ways that scholars attempt to explain judicial behavior. With regard to the legal model that stresses the written law and precedent, the courts spend most of their time interpreting national laws and precedents. National codes contain both the substance and procedure of both civil and criminal law With respect to the Attitudinal Model that focuses on judicial selection, the central

government chooses the judges for all of those courts. With reference to the Strategic Model that emphasizes influencing the judges after their appointments, the national government sets their compensation, even though state governments pays their salaries, provide their staff, and purchase their resources. But more importantly, the central government has the power to transfer and remove High Court Judges.

The Selection of the President and Presidency's Role in Judicial Appointments

Because the Presidency plays a central part in judicial selection for the Supreme Court and High Courts, the nature of the office merits some discussion. India selects the President by means of its Electoral College, consisting of the elected members of both Houses of Parliament and the elected members of the lower houses of the Legislative Assemblies of the States and Union Territories. But those votes do not have uniform weights. Votes cast by the members (MLAs) of a state or territory's legislative assembly count differently than those made by members of parliament (MP). The ruling party or coalition in both Houses of Parliament rarely has the ability to choose whomever it wants. A relatively wide set of interests, therefore, selects the President. If the President does play an independent role in judicial selection, it reduces the ideological influence of the Prime Minister on those appointments.

Because of malapportionment in both Houses of Parliament, the Electoral College favors the less populous states. The state and territorial legislatures choose the members of the Rajya Sabha (Upper House of Parliament). The weight of an MLA's vote consists in the total population of the state or territory, divided by the number of elected representatives in that member's legislative assembly divided again by one thousand. The weight of an MP's vote consists in the total number of MLAs in the country divided by the combined number of MPs from both Houses of Parliament. The states and territories,

therefore, play a role in the selection of the President, but have influence over judicial selections only indirectly. The office of the President functions as part of the Union government.

Debate continues as to the President's appropriate role in the selection of judges under the Indian Constitutional system. Some contend that the President must choose the judges that the Prime Minister recommends. According to this theory, the President plays a role analogous to that of the King or Queen of the U.K. Formally, the King or Queen chooses the judges, but informally the Prime Minister tells the King or Queen whom to choose. An alternative theory starts by noting that India's Parliament chooses the country's President. Therefore, the President serves as more than a ceremonial head. The Forty-Second Amendment (1976) to the Constitution altered the wording of Article 74 that governs the relationship between the President, on the one hand, and the Prime Minister and the Cabinet, on the other. Section 1, Clause 1 of Article 74 originally said:

> There shall be a Council of Ministers with the Prime Minister at the head to aid and advise the President, in the exercise of his functions, act in accordance with such advice.

After the Forty-Second Amendment (1977) it reads:

> There shall be a Council of Ministers with the Prime Minister at the head to aid and advise the President **who shall**, in the exercise of his functions, **act in accordance with such advises**. Provided that the President may require the Council of Ministers to reconsider such advice, either generally or otherwise, and the President shall act in accordance with the advice tendered after such reconsideration. (emphasis added)

The Eleventh Article of the Forty-Fourth Amendment (1978) added Section 1, Clause 2 of Article 74:

> **Provided that the President may require the Council of Ministers to reconsider such advice, either generally or otherwise, and the President shall act in accordance with the advice tendered after such reconsideration.** (emphasis added)

In other words, the President can only return a bill to the Cabinet one time before signing it. The President cannot repeatedly return the bill to either delay or prevent its passage, and the President has only one opportunity to suggest amendments to the bill by asking the Cabinet to reconsider it. After that, he must sign it. These amendments definitely cover judicial appointments, but they may not alter the President's role with respect to assenting to bills. Article 111 reads:

> When a Bill has been passed by the Houses of Parliament, it shall be presented to the President, and the President shall declare either that he assents to the Bill, or that he withholds assent therefrom:
>
> Provided that the President may, as soon as possible after the presentation to him of a Bill for assent, return the Bill if it is not a Money Bill to the Houses with a message requesting that they will reconsider the Bill or any specified provisions thereof and, in particular, will consider the desirability of introducing any such amendments as he may recommend in his message, and when a Bill is so returned, the Houses shall reconsider the Bill accordingly, and if the Bill is passed again by the Houses with or without amendment and presented to the President for assent, the President shall not withhold assent therefrom.

For our purposes we only need to note that comparing the language of Article 111, Article 74, and the two Amendments might indicate the meaning of the clauses before the changes made in 1977 and 1978. In any case, at least prior to 1977, the ambiguity in the text of the Constitution gave the President latitude with respect to the names that the President and Cabinet put forward for judicial appointments.

The Constitution subjects the Presidency to some constraints that can shape the strategic calculus of its occupant. The possibility of re-election could motivate changes in the decisions of a President vis-à-vis the judiciary. Advocates of the claim, that the Constitution empowers the President with some independence from the Prime Minister and the Cabinet, point out the hurdles to removing a President. Under a limited number of circumstances with obvious concrete bases in the Constitution, e.g., lack of qualifications

for being President, the Supreme Court can remove the President. The list of qualifications only comprises 1) being a citizen of India, 2) reaching thirty-five years in age, 2) meeting the requirements to be a member of the lower house of the national Parliament, and 4) holding no other elected or government office at the national, state, or local levels. Parliament's informal range of discretion for removing the President spans a wider set of vague transgressions. Formally, to begin the process a quarter of one House of Parliament must first sign a petition. Removing the President requires a super-majority of two-thirds of the entire membership of each house voting separately. The House that begins the trial prosecutes, while the other House serves as judge and jury. India has never removed a President.

The Supreme Court

The three *Judges Cases* (1982, 1993, and 1998) have altered the appointment mechanism in practice even if not in spirit (Article 124). The Supreme Court argues that its interpretations in the *Judges Cases* merely reaffirmed the original public understanding of the relevant clauses, updated them in the spirit of better fulfilling their original purposes of judicial independence, excellence among judges, and equal justice under law. Constitutional amendments have also changed the appointment mechanism. As with the role of the President, the following analysis only addresses the Constitution, as its drafters in the Constituent Assembly seem to have understood it in 1950. The Constitution sets the minimum size of the Supreme Court at seven Justices (Article 124(1)). Parliament can raise this number through ordinary legislation.

The President chooses both the Chief and Associate Justices (Article 124(2)). The President must "consult" the Justices of the Supreme Court and judges of the High Courts when choosing an Associate Justice. The Supreme Court has parsed this meaning of

"consult," but for our purposes we only have to note that all of these actors belong to the national government. Even assuming, that the Constituent Assembly debates would be dispositive, they do not make its meaning clear. Because the President chooses High Court judges, they too act on behalf of the central government. Whenever the Supreme Court lacks a quorum, the Chief Justice can, with the consent of the President and the Chief Justice of the relevant High Court, appoint a temporary Justice to the Supreme Court.

In terms of the Strategic Model, the relevant provisions of the Constitution insulate the Justices from external influence even further. No speech in either Parliament or a state legislature may even mention, let alone criticize, any member of the Supreme or High Courts with respect to that judge's discharge of judicial or administrative duties, unless during a motion for presenting an address in favor of removing that judge (Articles 121and 211). Both the Supreme and High Courts have total discretion regarding both hiring staff and spending resources (Articles 146(1) and 229). The Constitution guarantees and even specifies the sizes of both their salaries and pensions (Article 125(1), Article 221(1), and Schedule 2, Part D). Justices hold their seats until reaching the age of sixty-five (Article 125(2)). High Court judges must retire when they turn sixty. Notably, former Supreme and High Court judges cannot "plead or act in any court or before any within the territory of India" (Articles 124(7) and 220). This limitation increases the opportunity cost of leaving or losing a Supreme or High Court seat, but only if we assume that removal has become a credible threat.

The national government can remove Justices (Article 124(4) and (2)(b)). First, half of each house must vote for removal. With respect to each House's vote, at least two-thirds must be present to make that vote official. Only after those legislative procedures can the President remove the Justice. The grounds for removal comprise only

"incapacity" and "misbehavior" (Article 124(5)). Under Article 124(5), Parliament codified its internal procedure in the *Judges (Inquiry) Act* of 1968 and the *Judges (Inquiry) Rules* in 1969. These laws added two important hurdles to the process of removing a judge. First, even after a quarter of a House's membership signs and submits a petition, the Vice-President has the discretion to forego sending it to a panel of inquiry. In 2018, the Vice-President used this prerogative to quash a petition to remove the Chief Justice of the Supreme Court. The petitioners filed a complaint against the Vice-President in the Supreme Court itself but then withdrew the action immediately thereafter. The Supreme Court had only gone so far as to select the five Justices who would hear the case. The second hurdle consists of the panel of inquiry, comprised of a handful of MPs. It can decline submitting the accusations to the full House. No MP has ever challenged this prerogative.

Finally, the Legal Model indicates almost no influence from the states or territories on India's Supreme Court. The First and Third Legislative Lists from the Seventh Schedule of the Constitution, i.e., the Union and Concurrent Lists respectively, cover far more areas of public policy than List Two, the State List (Article 246). The President chooses the Governor for each state, and a Governor's powers of referral and veto reduce the likelihood that the Supreme Court would have to consider a state law. If the law appeared unconstitutional, the Constitution instructs the Governor to refer it to the President. A Governor, moreover, can withhold assent to any state law, with the exception of the budget.

The High Courts

High Courts operate within most parts of the same attitudinal, strategic, and legal context as the Supreme Court. The Constitution does describe the High Courts under Part

VI "The States," but it also calls them the High Courts "in" and "for" the states rather than High Courts "of" the states. In terms of appointments, the mechanism follows that of selections to the Supreme Court. Over the short term, the President unilaterally sets the size of each High Court (Article 216). Instead of consulting with the entire Supreme Court, the President consults with only the Chief Justice. The process adds consultations both with the Chief Justice of the High Court to which the appointment is being made and the Governor of the High Court's state. The Supreme Court does not have an express Constitutional prerogative to superintend the High Courts regarding issues such as efficiency, administration, and corruption (Dayal 1962, 551). Nevertheless, the Chief Justice regularly meets with the High Court Chief Justices to give them instructions, and he conducts inquiries into accusations of malfeasance in High Court. The procedure for removing a High Court judge matches the one for removing Justices of the Supreme Court (Article 217(1)(b)).

Some differences do exist between the operating environments for High Courts, on the one hand, and the one for the Supreme Court, on the other. The national government has the power to reorganize the entire judicial system and its locations. Some High Courts have multiple branches in their respective states. Because only one Supreme Court exists, the government cannot transfer a Justice to another court. On the other hand, India has twenty-four High Courts. The President, after consulting the Chief Justice of the Supreme Court, can transfer a High Court judge from one High Court to another, but not to a lower court (Article 222(1)). The Constitution also says that the transferred judge will receive extra monetary compensation, decided by general law enacted by the national Parliament (Article 221(2)).

The High Courts can also have temporary and ad hoc judges. If the President deems it necessary, he can place temporary judges on a high court for up to two years. If

temporarily a judge on the High Court other than the Chief Justice cannot serve, the President can appoint someone to serve in that role, until the permanent judge returns. The Chief Justice of a High Court can, with the permission of the President, reactivate any retired judged, whether from that High Court or another one (Article 224). The Constitution does not specify any limit to the time that these judges can remain at the High Court, once they have returned to the bench, and the government compensates them monetarily. The relevant clauses in the Constitution do not make it clear that the President can return those judges to private life at will. The Constitution also guarantees that a Union law will provide stipends to judges taking a leave of absence for situations such as family emergencies, health, and maternity (Articles 221(2) and 227).

The government has never removed a High Court judge by completing the full process, but it has initiated impeachment proceedings six times against five judges, and two of those judges resigned during the ongoing process. India's first attempt to remove a judge did not happen until 1993. That process against a High Court Judge failed to convince a majority of two-thirds of the entire Lok Sabha, the house that had initiated the process. Rajya Sabha MPs moved for the impeachment of another High Court judge in 2015, specifying certain language in one of that judge's opinions. Only hours later, the judge changed the language, and the Rajya Sabha withdrew the motion for impeachment. Sometimes the investigation initiated by the petition ends in a finding of no malfeasance before any voting, as it did for a judge in 2015.

A completed impeachment has never removed a judge, in part because no process has made it to a vote in both houses, but two have resulted in a resignation. The first of those resignations involved the only time that the process for removal has ever cleared the first hurdle of impeachment, when in 2011 the Rajya Sabha voted to send the indictment to the Lok Sabha. In a different process that led to a resignation, an

investigative panel of the Rajya Sabha scared a High Court Chief Justice into resigning in 2011. The government has in only one case started impeachment against the same judge more than one time. In both the 2016 and 2017 instances, too many of the initial signatories to the petition in the Rajya Sabha withdrew their consent before the process reached the next stage. In 2018 that judge retired before his mandatory retirement date, while an internal judicial investigation was ongoing.

The source of funding for the High Courts does differ from that for the Supreme Court. The state governments provide the judicial salaries (Article 202 (3)(d)), staff, and other resources for the High Courts. But the Constitution's language in Article 229(3) suggests that the High Courts simply send their respective states the bill:

The administrative expenses of a High Court, including all salaries, allowances and' pensions payable to or in respect of the officers and servants of the Court, shall be charged upon the Consolidated Fund of the State, and any fees or other moneys taken by the Court shall form part of that Fund.

A High Court's spending might push a state to the limits of its tolerance, but no state has yet objected during the entirety of India's experience with its Constitution.

The Constitution itself sets the minimum salaries that the states must pay the High Court Judges, and Parliament pays for the pensions of High Court judges. A High Court superintends civilian judicial institutions inferior to it, such as district, sessions, and magistrate courts, regarding issues such as efficiency, administration, and corruption (Article 227). High Courts do not have complete control over hiring their staff (Article 229). The President can issue a general rule that all hires must go through the State Public Service Commission (Article 229(1)). The state legislature and the President also play a role by laying down rules that circumscribe a High Court's discretion with respect to the salaries, allowances, leave, and pensions of the Court's staff (Article 229(1)). While the

Supreme Court is a creature of the Union, India's High Court Judges belong only almost entirely to that national government.

The District Courts

The Constituent Assembly did not limit its centralization of the judiciary to the High Courts, but rather, it also kept even the most local elements of the judiciary under the supervision. It centralized the judiciary even more than had the British Raj. Before independence, the local executive arm of the Raj (i.e., governor, lieutenant governor, chief commissioner) appointed District Magistrates who in turn appointed lower magistrates. These District Magistrates served simultaneously as the district chief of the police.

Under the Constitution's new scheme the centrally-appointed Governor appoints and removes not only the District Magistrates but also all inferior magistrates. The founders wanted to insulate the judges from the legislative cabinet of the state's legislature. India currently has thirty-six district courts. According to Article 233, the Governor must "consult" the relevant High Court, but in practice this means that High Courts give exams to candidates. He must also consult the High Court when removing District a Magistrate.

A JUSTIFICATION FOR THIS CHAPTER'S PERIODIZATION OF INDIA'S FEDERALIZATION

Demonstrating the validity of the "holding together" explanation for India's unitary judiciary requires the consideration of a longer time period than just the duration of India's constituent assembly. This chapter's discussion of the Indian "federal moment" encompasses the period from 1919—i.e., the adoption of the Government of India Act 1919—until 1950, when India began using its post-independence Constitution. Complete

freedom from the Metropolis rarely happened overnight for the British colonies in part because Parliament pursued what it—somewhat both condescendingly and disingenuously—called a policy of maturation. It wanted to gradually inculcate each colonial conquest in the ways of good government. The Colonial Office even tried to use the same nomenclature to refer the status of whatever colony had reached that next level of increasingly "responsible" government. A crown colonies and mandates would become a protectorates. Great Britain hoped that all of its mature colonies would follow the example of Australia, Canada, and New Zealand. The Empire intended each colony to become a royal dominion within the worldwide British commonwealth.

Great Britain planned to walk each colony through progressive stages of greater self-rule, but oftentimes the promotion from one level to the next had more to do with short-term necessities than long-term planning. Devolution of greater discretion to a colony often signified Parliament's attempt to mollify both civil and uncivil unrest related to demands for independence. Sometimes the disorder reached levels that prompted the Foreign Office to "demote" a colony to a lower level of autonomy. Each "level" also had sublevels within it that allowed the British to promote and demote by changing not only kinds but also degrees of autonomy. The Empire could change the ratio between elected and appointed seats in the colony's legislative council, remove certain policy domains from domestic control, or reintroduce "advisory" colonial monitors. In a word, just like every other part of the Empire (except those thirteen wayward American colonies), India did not achieve "responsible government" in one fell swoop by winning one war for independence.

As with Britain's predominantly settler (e.g., Australia, Canada) and chiefly indigenous (e.g., Nigeria, Kenya) colonies, the institutions only indirectly connected to self-rule also changed gradually. None of India's governmental institutions transformed

overnight from those appropriate to an occupied dependency into those inherent to a sovereign state. India's incremental progression through various institutional arrangements on the road to genuine home rule had long-term consequences because of its fitfulness. The pre-independence institutional design of the American colonies influenced the nature of the Articles of Confederation. The specific natures of both 1) the process of decolonization and 2) the last colonial institutional arrangement likewise influenced the shape of India's federalism under its new Constitution.

According to one hypothesis, the various institutional arrangements—that predated the scheme in place at the moment of federalization—did not influence the contours of the new polity's federalism. They had little to no influence because they were not chronologically proximate. All of configurations that belonged to the preceding stages merely culminated in the specific institutional structure in place immediately before negotiating the 1949 constitution. Any institutions that existed before 1946-1947 mattered to the 1949 constitution only insofar that they existed in 1946-1947. Path dependence began and a critical juncture took place not in 1919, but in 1949. India's institutional arrangement at that point had not resulted from previous institutional choices or the limits that those chosen institutions placed on the range of possibilities for later institutional change.

Broadening the examination of a "critical juncture" beyond the immediately preceding institutional arrangement often proves unwieldy. Any analysis of new institutions risks an infinite regress of additional explanations based on preexisting institutions. Suppose that we attribute the shape of the institutional array present at time Z to the institutional arrangement at prior time Y. No limiting principle prevents us from positing an institutional configuration, existing at prior moment X, that caused the institutional structure at Y. Why not then examine the various institutional frameworks

present at times W through A. Notwithstanding these sensible objections, the Indian case demonstrates the benefits of making a moderate exception.

While the centralized judiciary of the former princely states in 1947-1949 was merely months old, the decentralized judiciaries of the princely states had existed for decades. The ultimate adoption of a centralized judiciary for the princely states defied the idea that longstanding institutions have a more powerful influence than newer ones in the constituent assembly. Institutions of recent vintage lack the preferred status that comes with "time out mind" familiarity. Absent are the deep roots that grow from intertwining with society, other political institutions, and various vested interests.

Older institutions, if not for any other reason than the inertia inherent to familiarity, tend to endure longer in the future than newer institutions. A chronological cross-section of a country's constitutional development can hide more than it reveals about the age and influence of institutions. Limiting the scope of the analysis to the situation in 1946-1947 reveals nothing about the relative age of various aspects of British India's governmental scheme at that moment. But the influence of those longstanding institutions upon the last pre-federal institutional design was not absolute. In other words, the apparatus founded in 1919 was not the cause of every aspect of the arrangement extant in 1947. Nevertheless, path dependence from a critical juncture need not be categorical to merit close analysis. The pre-independence structure of 1947 reflects 1) deliberate rejection of aspects of a previous arrangement, 2) the continuation of features deemed preferable, 3) the disuse of certain elements simply because they lack enough historical inertia, and 4) the perseverance of undesired institutional characteristics, thanks to insurmountable inertia.

Expanding the time period under investigation to this extent achieves at least three other purposes. First, it facilitates the goal of uncovering important details when tracing

the federalization process; it reveals, for example, that the Raj was surrendering control in two distinguishable ways: to the provinces and to the indigenous population. The Empire had to consider not only the timing and nature of the self-rule it relinquished to Indians, but it also had to decide which level of the government would have which powers. Second, careful analysis of the Raj's stage-by-stage devolution of the machinery of government suggests an intermediate phase (i.e., before the new constitution) during which India exhibited asymmetrical federalism. Contrary to the argument that India lacked genuine federalism until the adoption of its 1949 Constitution, India's transformation from unitary dependency into independent federation involved two federal moments. Third, expanding the chronological scope aids the goal of distinguishing between real and *faux* federalism in India.

CLARIFYING DIFFICULTIES IN THE CHRONOLOGY OF INDIA'S TWO FEDERAL MOMENTS

The start and end dates of the federating process must remain relatively inexact; considerable variation existed among the center-periphery relationships—first with the Raj and then with the interim central government—of the over 550 individual princely states. The first federal moment began when Bikaner agreed to the IOA on August 7, 1947 and ended when the Maharaja of Mysore signed the modified IOA on June 1, 1949. While the overall process of federating remained in flux, a temporary asymmetrical federalism existed. The states nearer the front of the queue—because of variations in geographic distance from the center, differences among states in the decisiveness of their respective princes, and the relative availability of the envoys from the central government—signed their SSAs and IOAs earlier. But this phenomenon was not the only reason India experienced temporary asymmetric federalism from 1947 until 1950.

Whether by merger agreement, amended IOA, or military defeat, all of those princely political units ruined their autonomy from the interim government before their political representatives in the constituent assembly could reject the new constitution. In fact, while the interim central government's initial IOAs guaranteed the right to refuse to remain part of the new country, even after the finalization of the new constitution (especially if the constituent assembly adopted a republican constitution); but the princely states signed away this prerogative before the constituent assembly completed its work. During the process, some princely states lost their autonomy earlier than others, until India became unitary. Hence, at a given moment between 1947 and 1949, some states had not signed an IOA or militarily annexed (i.e., remained totally independent and paramount), others existed according to the original IOAs (i.e., had temporarily transferred some prerogatives to the center), and the states in another group had lost all of their autonomy (i.e., functioned as administrative districts in a unitary state). Nevertheless, by June 1, 1949, with the exception of Jammu and Kashmir, India was essentially unitary.

As illogical as it might seem, conceptual accuracy demands the conclusion that India's second federal moment began before its first one ended. When the constituent assembly first met on 9 December 1946, the deliberative process began that ultimately devolved prerogatives to the provinces. Hence, the second federal moment commenced for the provinces before it started for the princely states. In fact, the first federal moment did not even involve the central provinces. When the constitution took effect 26 January 1950, the federal moment ended. The princely states that the interim government had agglomerated to the unitary state regained some of their prerogatives, while both the provinces and some of the former chief commissioner provinces acquired elements of genuine autonomy for the first time.

DID INDIA HAVE ONE FEDERAL MOMENT OR TWO?

Any of three alternative characterizations of India's federal moment(s) support the "coming together" vs. "holding together" theory of the determinants of judicial structure in a federation. According to one plausible perspective, a single continuous process of "holding together" began in 1946 and concluded in 1950. In line with this view, at no time prior to the adoption of the 1949 Constitution was India truly a federation. India became unitary, however briefly, before it ever became federal. In other words, it would be a mistake to treat any ostensible signs of federalism—during the period after independence but before the interim government folded the princely states into an entirely unitary political system—as more than an ephemeral snapshot of a continuous process. This version of India's federalization process contends that, otherwise, the account improperly counts two federal moments instead of just one.

According to a second characterization of India's federal moment(s), the country experienced "coming together" and "holding together" moments simultaneously. This description creates the need to explain why India emerged with symmetric judicial federalism. The former princely states could have had decentralized judiciaries, even though the former governor's provinces retained centralized judiciaries. We can account for the symmetry in judicial arrangements by attributing it to 1) the provinces' ability to negotiate as a unified bloc, 2) the unevenness of wealth, population, and landmass between the provinces and the princely states, and 3) the princely states' much weaker involvement in the interim government. Thus the effects of the governor's provinces' "holding together" outweighed the influence of the princely states' "coming together."

According to the third and final alternative characterization, two federal moments took place in succession: one "coming together" (1947-1948) and the other holding together (1948-1950). We could justifiably describe India as a hybrid state—

geographically half-federal and half unitary—well before the Constitution ended the need for the interim government. The princely states had experienced a "coming together" moment vis-à-vis the provinces and each other, while the provinces did not experience a federal moment and remained unitary. It was a brief time period: extending between August 15, 1947, when the first Instruments of Accession (IOAs) and Standstill Agreements (SSAs) applied, and 1948, when the last of the princely states signed an agreement to give up its autonomy fully. As each additional princely state agreed to an initial IOA and SSA, a larger percentage of the hybrid state was actually federal. Conversely, as each additional princely state agreed to amend its IOA to capitulate its autonomy, the state became more unitary.

Accepting this characterization of events actually provides more evidence for the argument that "coming together" moments produce decentralized judiciaries while "holding together" moments beget centralized judiciaries. When the princely states came together with the provinces, through the IOAs and SSAs, they did not lose their control over their domestic judiciaries. They only relinquished control over the same prerogatives—communications, defense, and foreign policy—that the British Raj had long been managing on their behalf. The original draft of the Constitution differentiated between the states and the provinces as regards the jurisdiction of the Supreme Court and did not create the high courts in the princely states.

But after signing merger agreements and modified IOAs, the princely states lost their autonomy from the center. India was briefly unitary. The activation of the new Constitution functioned as a moment of "holding together," where the provinces gained certain autonomies they had never had, and the former princely states regained autonomies they had only recently lost to the center. The Constitution as finally adopted

removed any disparity indicated in prior drafts and integrated the judicial systems of the Provinces and States into one hierarchical system (India 1950, 119).

The Government of India Act 1935 did not achieve its goal of a federal India, but not just because the princely states opted to stay out of it. The central provinces did not have true federal autonomy because the central government still chose the provincial governors. Those provincial governors had both an absolute veto over the provincial legislatures and full control over the executive functions of the provinces. Even the structure of the interim regime—between independence and the adoption of the 1949 Constitution—lacked federalism for the provinces. When the Congress Party received control of the national government from the British, it did not relinquish the central control that the British had maintained over the provinces. It did not amend the 1935 Act to allow provincial control over provincial governors, or to allow a provincial legislature to override a provincial governor's veto. Centrally-chosen provincial governors still had the power to veto any legislation passed by a provincial legislature.

During the period both immediately before and after independence, some of the newly autonomous princely states joined the centralized provinces of India, and some joined the centralized provinces of Pakistan. The version of autonomy from the center held by the princely states during the Raj did not become the model for federalism in postcolonial India. Instead, the institutions, informal norms, and expectations that governed the provinces became the template for the new government. To understand the nature of autonomy held by the provinces vis-à-vis the center during the Raj is to understand the nature of the federalism that India adopted in 1949 in its independence Constitution. The nature of the autonomy that the provinces had from the center during the twilight of the Raj was the culmination of an evolutionary process that began after World War I. The distinctiveness of the last version of provincial autonomy prior to

independence becomes clearer from the perspective of that gradual devolutionary process.

A SKETCH OF THE VARIATIONS IN POLITICAL STRUCTURE UNDER THE BRITISH RAJ

Subsequent sections detail both the institutions and the process of federalization, so this introduction merely sketches them. Not only did structural factors predispose India toward judicial decentralization, but some institutions would also have made judicial centralization difficult—if not impossible—had not the federating process forestalled their decentralizing effects by removing them.

Central Provinces of British India vs. Princely States

Britain did not govern the various parts of its Indian colonies in uniform fashion. Notwithstanding the existence of granular differences between the particular political units within each type of colonial governance, British India consisted of roughly two groups: the "central provinces" and the princely states. India's federating moment engendered a centralized judiciary, despite the inclusion of those political units that had experienced significant autonomy through indirect rule, from both the Raj (during the period from colonization until independence in 1947) and the interim central government (during the period from independence until 1949). While the Raj engaged in direct rule of the provinces, it used indirect rule for the princely states.

At the top of the administrative pyramid of the Raj stood the Viceroy-cum-Governor General. As the Crown's highest representative in India, he reported directly to the Secretary of State for India, a member of the British cabinet. As Governor General he both oversaw the external and internal affairs of the central provinces and supervised local British governors who administered them. These central or governor's provinces

should not be confused with the Central Provinces. While the central provinces encompassed all of the provinces governed by British governors and lieutenant governors, the Central Provinces were merely one province that covered parts of present-day Madhya Pradesh, Chhattisgarh and Maharashtra states. Provincial governors had the moniker lieutenant governor in the smaller provinces. The judiciary within each province was merely one inferior part of the national judiciary that the central government controlled. The judiciary of a province belonged to that province only in terms of its name and location.

In his capacity as Viceroy, the Viceroy-cum-Governor General controlled foreign affairs, communications, and external defense for the princely states, but each indigenous monarch ruled almost all domestic affairs in his own princely state. The internal governance of the princely states varied from those systems in which relatively representative democratic institutions limited the power of the prince to those where the prince ruled autocratically. The Governor General used the title Viceroy when interacting with the princely states, in order to maintain the pretense that the Indian princes engaged with the Crown as fellow royals. Most importantly for the subject of this research, each princely state had its own judiciary separate from that of the other princely states and the central provinces. These judicial systems among the princely states existed along a continuum from rudimentary ones where the courts had no independence from the princely executive, on the one hand, to judiciaries approximating the structure and professionalism of the British High Courts in the governor's provinces.

Chief Commissioner's Provinces

Aside from the princely states and the provinces, a third set of political units, chief-commissioners provinces, remained under direct British control until independence,

whereafter they became ordinary self-governing provinces or federal territories, substituting the direct control of the Raj with the direct control of the Indian central government. When it wanted greater direct control over certain cities and provinces, the Raj reduced their autonomy, transforming them into chief commissioner's provinces. The British established other chief commissioners for provinces with weak institutions. The experience of this third class of political units tracks closely with that of the Northwest Territory of the United States until its components achieved statehood (Eblen 1968); just as the territorial governors served at the pleasure of the U.S. federal government, holding ultimate local authority, so too did the Indian chief-commissioners control these federal territories at the pleasure of the Raj.

This chapter focuses upon the central provinces and the princely states. The federalization process for the third set of political units (the chief commissioner provinces) did not differ from that of the ordinary provinces in any meaningful way. Among those territories that the central government administered directly until the adoption of the constitution, some achieved autonomy, but like the provinces they only acquired it for their executive and legislative branches. The remainder of those chief commissioner territories achieved no autonomy from the center. In other words, the center—be it the Raj, the interim Indian government, or the republic of the new constitution—governed them both before and after the adoption of the constitution. The new constitution substituted the name lieutenant governor for that of chief commissioner for those territories that remained under federal supervision. For some of what had been the smaller provinces during the Raj, the charter upgraded the name and powers of the chief executive from lieutenant governor to governor.

ANTECEDENTS TO INDIA'S FEDERAL FORMATION

The Evolution of Britain's Administration of India, Pakistan, and Bangladesh

As previously explained, before they became the separate countries of India, Pakistan, and Bangladesh, these territories existed under British rule as 1) a group of provinces administered by the central colonial government and 2) a set of princely states with internal autonomy. Starting in 1919, the Raj took discrete steps right up to the line the other side of which would have meant establishing federalism in India, but the Crown never crossed that line. During the first stage of devolution, the Raj attempted a hybrid arrangement between colonial unilateralism and Indian sovereignty at the provincial but not national level of government. But, even at the provincial level, the Governors both retained—with respect to both legislative and executive function—a plenary *de jure* veto, and exercised *de facto* absolute control. These changes left the princely states unaffected.

Later, notwithstanding the wide consensus that this half-breed design had proven chimerical in the provinces, the Empire applied it to the national government. Simultaneously, the Raj admitted the unworkability of the hybrid system by abandoning it in the provinces. Under the formal rules that applied during normal conditions, at both the national and provincial levels, devolution to the provincial level and the indigenous population was reality. But the new system also formalized and regularized the overrides of the Governors and Governor-General and vitiated responsible government entirely, as these exceptions became the norm. While the Empire was altering its relationship with the provinces in this manner, its attempt to entice the princely states into an asymmetric federation with the provinces foundered. True symmetric federalism did not occur in India under the umbrella of the British Empire. Britain tried and failed at converting the

Raj into a federal British India, and even asymmetric federalism did not occur until independence had a scheduled date.

The Government of India Act 1919: Dyarchy & Faux Autonomy

The road to provincial and national self-rule was long, halting, and consisted of many "convoluted" steps (Chiriyankandath 1992, 42; De 2016). The Empire was facing nationalist protests—steadily increasing in number and intensity—that called for more indigenous control when they did not demand outright independence. The government of Great Britain did not want to give the provinces the same degree of autonomy as the princely states; but at least ostensibly the Raj hoped to move the provinces toward self-rule in order to mollify Indian political elites.

In the first small step toward true decentralization, Articles 1 to 16 of the Government of India Act 1919 granted a degree of self-rule to the provincial governments, but Articles 17 to 47 did not increase self-rule for the indigenous elements of the national government (Curtis 1976, 573-598; Great Britain, India Office 1919). Even at the level of the provinces where it putatively granted some indigenous control, the colonial government sought ways to split the difference between colonial dictatorship and indigenous control.

In this spirit, the Government of India Act 1919 invented a system of "dyarchy" within the central provinces (Chiriyankandath 1992, 43). As protests increased during the first two decades of the twentieth century (Ghosh 2017), the British Government commissioned the Viceroy of India, Lord Chelmsford, to propose reforms. The resulting Montagu-Chelmsford Report of 1918 provided the blueprint for the Government of India Act 1919. In theory, each provincial governor retained "reserved" powers in important policy domains while indigenous provincial governments gained "transferred"

prerogatives related to less vital policy areas (Great Britain, India Office 1918, 176; Legg 2016). The Act divided the executive branch into 1) the provincial governor's Executive Council whose ministers controlled the reserved prerogatives and 2) the provincial legislature's Executive Government whose members administered the transferred policy domains (Malaviya 1918, 43).

Since certain changes in 1909, indigenous legislative representatives at the provincial level had the power to suggest legislation in some policy areas, but this power was not especially important nor did it become more important under the 1919 Act. In fact, even though the Empire maintained the majority in the central legislature according to the Indian Councils Act 1909, the Act structured the provincial assemblies to give the native population a majority in each of them (De 2016, 25).

But elections do not make a form of government democratic if the elected officials hold no power. An indigenous majority in the provincial legislatures since 1909 did not constitute an increase in autonomy for the provinces since those provincial legislatures had no power. They remained impotent because the enactment of their bills required the approval of the provincial governor. The national legislature, where at least some of the real power existed, remained in the control of an "official" majority until 1919.

At the provincial level, the indigenous assemblies could only slow the process of change from the status quo, but in almost every domestic policy domain, the indigenous dominated assemblies wanted change. For the status quo was what the colonial government had already instituted in terms of policy or the socio-economic situation the government refused to make efforts to change. What the indigenous assemblies wanted were the powers of both initiative and veto-proof effect in the most important policy domains. In response to specific legislation, the provincial governor could override the

indigenous assembly. At least on paper, with respect to those transferred policy domains the governor of each province would consult with the indigenous assembly, overriding its advice only when he had "good reason" to do so, i.e., under the most extenuating circumstances. The assembly could not override the provincial governor's veto via a super majority vote. Of course, this aspect of the institutional arrangement of the "transferred" domains only applied during normal conditions.

By invoking emergency powers in order to issue decrees, in effect a provincial governor could enact his own legislation in those policy domains that the Act had supposedly transferred to the Indians. The provincial assemblies only had a soft veto over the legislation of their respective provinces. If the provincial governor wanted a law, notwithstanding indigenous objections, he could get it. Political considerations might have made it difficult for the provincial governor to defy the provincial assembly; the governor had to guess at the probability and size of any backlash, but if the issue were important enough to the Crown, the governor would override the wishes of the indigenous assembly.

The Act did transfer cabinet positions to indigenous ministers, but in practice the indigenous ministers worked alongside a colonial official whose assistance functioned more like control than advice. These colonial facilitators were indistinguishable in all but name from the colonial executives in charge of the reserved policy domains (De 2016, 27). A number of indigenous ministries controlled a general transferred subject the components of which remained under the control of the provincial governor and his administrators.

The effect of the new indigenous provincial legislatures was not only vitiated by the continued existence of the provincial governor's veto over all provincial legislation and the governor's ability to pass legislation without the approval of the indigenous

assembly. Most of the provincial governors took advantage of a loophole in the dyarchical arrangement. The exception allowed a governor to exempt certain transferred policy domains or all policy domains (De 2016, 27). In fact, many provincial governors went so far as to get their entire provinces exempted from the transfer to the indigenous assemblies of each prerogative to enact legislation. The provincial governors of the Chota Nagpur plateau, Orissa, and Assam prevented any powers from transfer to their indigenous assemblies (De 2016, 27).

Combined, the normal and the emergency powers reduced the meaningfulness of the distinction between transferred and reserved powers. The colonial government, in the person of the provincial governor, maintained a veto over anything the indigenous provincial legislatures enacted, controlled formally the most important policy domains as "reserved" subjects, directed informally the indigenous cabinet ministries for transferred subjects, and exercised through emergency decrees the plenary power of the British government that remained underneath the patina of indigenous legislative and executive autonomy in the provinces. In light of these institutional arrangements, it is clear why the Government of India Act 1919 did not make India a federation.

Notably, Indian calls for reform of the Government of India Act 1919 generally excluded the judiciary from the list of powers sought for the provinces. Sachchidananda Sinha argued for:

> the transfer to the Ministry of all departments of the Provincial Governments other than those administered in the Political and Judicial, namely the control of the police and the jails, and of the administration of justice (both civil and criminal) or rather of the magistracy and the judiciary, apart from their judicial work. (Sinha 1935, 9)

The Last British Constitution of India: Government of India Act 1935

In the Government of India Act 1935 the Raj attempted to amalgamate British India with the princely states into a colonial semi-independent federation, but none of the federal elements of the Act ever took effect. The Act would have given the princely states 104 (40%) of the 260 upper house seats and 125 (33%) of the 375 lower house seats in the bicameral Federal Legislature. Both houses would have therefore been malapportioned to overrepresent the interests of the princely states. The princes had full discretion in choosing their representatives for the national legislature. They did not have to subject themselves to elections either, so the selections were not even indirectly democratic.

The Government of India Act 1935 took the process toward self-rule an additional step forward by ending the system of diarchy in the provinces. The legislative branch in the provinces remained elective as with the Government of India Act 1919. One major change involved the removal of the distinction between transferred and reserved powers. At least on paper, the indigenous assemblies now had legislative control over all domestic policy domains. In addition, members of the legislature now held the cabinet posts in the executive. The provincial governor's Executive Council and the provincial legislature's Executive Government became one body. Notwithstanding this move toward self-rule, the provincial governors retained veto power over any legislation as well as over any ministerial actions taken by members of the cabinet. Finally, while it may not have vitiated the democratic nature of these changes entirely, Great Britain weakened the supposed increase of democracy in India by giving the provincial governors new legislative powers (De 2016, 29).

While such powers had vaguely existed under the Government of India Act 1919, now they became explicit. Meanwhile, at the national level the government became

dyarchical. The Government of India Act 1935 did not cause a federal moment for India because 1) the princely states refused to be part of the federation (De 2016, 29), and 2) the measure of independence achieved for the interim government in 1937 did not mean increased autonomy for the provinces. The Act itself required that fifty percent of the princes formally consent to joining.

The indigenous central government maintained the right to veto any legislation enacted or executive action taken by the indigenous provincial assemblies. The interim government of Nehru controlled the provincial governors who in turn retained various prerogatives for overriding the elected parts of the provincial governments. The British government considered the 1935 Constitution federal for the provinces, even though it did not give the provincial governments true autonomy.

From the beginning of the Raj, several of the largest princely states were in direct relations with the Governor-General, but even this arrangement did not make India federal. Baroda (1805), Hyderabad (1798), Jammu & Kashmir (1846), Mysore (1799), and Gwalior (1782) had all ceded paramountcy for external affairs before the turn of the twentieth century. Still, they had no representation in the central government of British India. These princely states did not have legislative representation in the Imperial Legislative Council—neither in the Central Legislative Assembly (lower house), created in 1861, nor in the Council of State (upper house), created in 1919. The Government of India Act 1935 would have given them representation in both of these bodies, but the Council of Princes rejected it.

Notably, when the Raj devolved greater self-rule to the provinces, it did not give them control over their provincial judiciaries. Meanwhile, the princely states retained the same control over their executive, legislative, and judicial functions that Great Britain permitted them at the birth of the Raj. So long as they agreed that Great Britain had

sovereignty over them and would conduct foreign policy for them, the princely states retained significant autonomy over their domestic affairs. The 1935 Act would not have altered the princely states' autonomy in domestic areas of public policy.

THE BEGINNING OF INDIA'S FIRST FEDERAL MOMENT

Negotiations between "British India" and the Princely States: India's First Federal Moment as a "Coming Together" Process

The integration of the princely states was not consistent with the most common types of negotiations that take place in "coming together" federal moments. The central government of India and the British government negotiated, cajoled, and then coerced the entrance of the princely states into the newly independent Indian Republic. By the time of the conclusion of the Constituent Assembly of India (but after the partition from Pakistan), the negotiation with the each of the 568 princely states was complete (Bhattacharya 1992).

During the first stage of negotiations, the central government and the princely states signed Stand Still Agreements (SSA) and Instruments of Accession (IOA) that, when combined, left each princely state with most of its previous domestic powers and perquisites, ceding only external affairs, defense, and communications to the central government. With the SSAs the princely states formalized the continuation of the relationship that they had with the provinces during the Raj, but the IOAs signified something new. The princely states were agreeing to place themselves in relationship with the new interim government the same way that they had been in relationship with the British Empire, except that their agreements with the Raj did not have an exit clause.

In point of fact, these IOAs were far more generous to the princely states than the Government of India Act 1935's standard IOAs that the entire council of princes had

rejected a decade earlier. Even with respect to the relinquished powers, the instruments left possible the princely governments' exertion of power in these areas through their control of tax revenues for those functions (Copland 1997, 256). The IOAs also guaranteed to the states immunity from the future constitution and the ability to leave the union if India became a republic. The princes also received assurances that none of the largest eighteen states would ever have to territorially combine with any other states or provinces. The advantageous terms of these IOAs makes it unsurprising that, by the date of the transfer of power from Britain to India and Pakistan on August 15, 1947, nearly all of the princely states had signed them.

Mountbatten, the last Viceroy-cum-Governor-General of the colony and first Governor-General of the independent Union, ultimately pressured the princes to sign the IOAs and join the provinces in the interim government (Copland 1997, 257-258). Initially however, rather than focus on the situation of the princely states, he prioritized the effort to convince the Indian Union's peaceful acquiescence to the partition of the League territories. Britain's greatest fear, i.e., India going to war to keep control over all of the predominantly Muslim territories that the Muslim League claimed as its own, was an unacceptable outcome for Mountbatten. Then he realized that altering the status of the princely states could help in the delicate endeavor of mollifying the Indian Union; by persuading the princely states to join the provinces he would be giving the Union something in return for letting the Muslim league territories exit in order to form Pakistan (Copland 1997, 254).

India's Transformation from a Hybrid State, of both Federal Princely States and Centralized Provinces, into a Centralized Unitary State

The Congress Party disputed an interpretation of the Independence Act 1947 wherein the Raj's "paramountcy"—over the princely states for external affairs, defense, and communications—would return to each separate princely state upon independence. The Raj's renunciation of paramountcy did not mean that the Union government gained paramountcy over the princely states. Even though the Independence of India Act 1947 guaranteed each princely state the right to become an independent country, this independence did not include the right to dominion status within the commonwealth or automatic diplomatic recognition by the British government. Mountbatten used this subtle distinction between achieving independence and acquiring dominion status in order to pressure the princes to acceding to the Union. According, to the Independence Act 1949, the Union and Pakistan were entitled to dominion status, and any princely state that joined one of these new dominions would *eo ipso* gain dominion status, albeit most likely by sacrificing most if not all of its autonomy to either the Indian Union or Pakistan.

The central government then completed what was in effect a bait and switch (Bangash 2006). In December 1947 the Union government began the process of cajoling the princely states to merge, with other princely states and provinces, to form larger political units. Simultaneously, the Union convinced princes to relinquish their ruling powers. Both of these actions constituted clear violations of the recently signed SSA's and IOA's (Copland 1997, 262). In order to palliate the princes, the central government provided them with pensions, lifetime healthcare, and other personal guarantees in exchange for relinquishing their formal political power (Copland 1997, 265).

By the time of this *volte-face*, the princes and their governments had already lost nearly all, if not all, of their negotiating leverage. Even though exiting the Union was

formally permitted and technically would not cost a princely state its representation in the constituent assembly, the political and practical costs of withdrawal at least appeared prohibitive.

Turning Princes into Rajpramukhs-cum-Governors

In addition to providing the Princes with monetary benefits in exchange for giving up their states, the interim government kept many of the princes on as ceremonial chief executives for their respective states turned provinces. Both before and after the adoption of the Constitution, these Rajpramukhs functioned like provincial governors and likewise served at the pleasure of the central government. Until the Constitution took effect, the interim government maintained its unitary control over India's political units through the governors and Rajpramukhs. Those chief executives retained both the ability to override the provincial cabinet in any executive decisions and complete veto power over the provincial legislatures. In their use of those powers, the princes serving as Rajpramukhs followed the orders of the center because the interim government could remove them at will. One moment in the Constituent Convention made the equality of the Rajpramukhs and governors especially clear:

> Now, the States would be bound by the Constitution which we are making. As matters originally stood an option was given to these States either to adopt the Constitution or to reject it; but in view of the recent covenants I believe that option no longer exists. But even assuming that it exists, there is no doubt that all the States would ultimately accept this Constitution. So the position is that the Constitution of the future Union of India which we are at present framing would apply to all areas included in the Indian States. Therefore the House would have to take into consideration the position of that person who in these States would be analogous to the Governor in the provinces. The House may be knowing that in the States which have acceded and which would be ultimately bound by this Constitution, either the States individually or their Unions, have at their head Rajpramukhs, whose position is if not hereditary, at least for their life-time. The Government of India have bound themselves that this position of theirs would

> continue for their life-time at least. If that be the position, then is it not a little amusing to see that the discussion here is centering round as to whether the appointments of Governors would be by election or not? The argument in favour of the appointment of Governors by the President is this that if there is no such appointment, the Prime Minister would not be able to discharge his responsibility to maintain peace. Now the Indian States form one-third of the whole India. If the one-third is governed by Rajpramukhs who are not the President's nominees and if the Prime Minister would still be able to discharge his duty or responsibility to maintain peace, then it can be very well imagined that he can do the same with the Governors in the rest of India being his non-appointees. In fact here is an incongruity. Either the House would have ultimately to find out and make certain provisions by which these Rajpramukhs would be brought on level with the Governors and their powers made identical with Governor's or the other alternative is this. Two years back there was a Resolution adopted by this House, I am told, that the Governors should be elected. It was then urged that if the Governors be not elected the principle of democracy would be stifled, that the autonomous character of the provinces would be lost. But the House has now veered to the view that Governors if appointed would be better in the interest of the country. If no provision in this Constitution is made to bring the Rajpramukhs on level with the Governors regarding their powers then the other alternative is to veer still further and when time comes for reconsideration of this constitution, then all the Governors who may be holding office at that time may be made hereditary or at least their tenure may be made to last for their life-time. These are the only two alternative before this House. I urge that the House will have to consider provisions which may be necessary to bring the Rajpramukhs on level with Governors. I sound this note of warning with the object that the House may not lose sight of the important of such provisions. All along I find in the Constitution no provisions are made so far for the States or their Unions. We assume and it must be assumed in the circumstances of the case that the States would form a part of the Union; But in spite of this assumption no provision is being thought of as to how to make the Unions of States or States on level with the provinces. V.S. Sarwate, 8.95.83, May 31, 1949, Volume VIII, p. 898

Article 366 of the 1950 Constitution simply constitutionalized most of the *ex ante* arrangement. After the Constitution's adoption, the Rajpramukhs-cum-governors still served at the pleasure of the president of the union. The president could remove them at any time without any explicit justification:

> Art 366 (21): Rajpramukh means- (a) in relation to the States of Hyderabad, the person for the time being is recognised by the President as Nizam of Hyderabad; (b) in relation to the State of Jammu and Kashmir or the State of Mysore, the

person who for the time being is recognised by the President as the Maharaja of that State; and (c) in relation to any other State specified in Part B of the First Schedule, the person who for the time being is recognised by the President as the Rajpramukh of that State, and includes in relation to any of the said States any person for the time being recognised by the President as competent to exercise the powers of the Rajpramukh in relation to that State.

In other words, only in title did the Rajpramukhs remain distinct from the governors of the other states in the Union. Rajpramukhs acted as the governors of the "Part B" states: Hyderabad, Saurashtra, Mysore, Travancore-Cochin, Madhya Bharat, Vindhya Pradesh, Patiala and East Punjab States Union (PEPSU), and Rajasthan. Once the last prince of a state died, the title Rajpramukh changed to governor. The Constitution altered the relationship between the governors and the subnational legislatures by weakening gubernatorial control over the state cabinet's executive powers and eliminating the veto regarding spending bills. But the center continued to choose the governors.

Table 6.2 - The Central Government of India's Integration of the Princely States

Type of Consolidation	# of States	km^2	Population
Merged into Preexisting Provinces	216	108,789	19,158,000
Changed into Centrally Administered Areas	61	68,704	6,925,000
Changed into Unions of States	275	215,450	34,700,000
Totals	552	392,943	607,830,000

Princely States Merged into Existing Provinces

The Union convinced many princely states to merge into one of the preexisting provinces, on the basis of those princely states' geographic contiguity or proximity to preexisting provinces; even though a princely state was not adjacent to a preexisting province, it became part of the province because the princely state adjoined a princely state that did neighbor the preexisting province. Small geographic size, inadequate

government revenues, and weak public administration among these princely states motivated their mergers with the preexisting provinces. Some princely states did not merge with a province immediately, but rather, they became provinces or centrally administered areas first. Cooch Behar acceded to integration with the Union for defense, on August 30, 1949, and on September 12, 1949 it became centrally administered as a Chief Commissioner's province. Finally, Cooch Behar merged with West Bengal on January 1, 1950.

Princely States Converted into Centrally Administered Areas

A second set of merged princely states came under the administration of the central government. Many of these territories attempted self-government, using the autonomy granted to them by the center, but political infighting, riots, and failures of government ensued. Because local leaders invited it or because it invited itself, the government in Delhi appointed chief commissioners to administer these former princely states. These chief executives had almost a monopoly on governmental prerogative because they dissolved any extant local assemblies and did not create any new ones.

Princely States Merged into Unions of States

In other cases, Patel and Menon convinced rulers to amalgamate their princely states into unions. These new political units were provinces in all but name. The Union Government had to approve a new state's chief executive; that executive could override the new state's legislature and take independent executive action; the legislature could not override the state's chief executive. In some cases, one of the Rajpramukhs from one of the states merged into the new union of states became the Rajpramukh for the entire union of states.

Table 6.3 - Merging States into Existing Provinces					
Date	**States Merged into Preexisting Province**	**Province**	**#**	**mi^2**	**Population**
Jan 1 1948	Athgar, Athmalik, Bamra, Baramba, Baudh, Bonai, Daspalla, Dhenkanal, Gangpur, Hindol, Kalahandi, Keonjhar, Khandpara, Narsingpur, Nayagarh, Nilgiri, Pal Lahara, Patna, Rairakhol, Rampur, Sonepur, Talchar, Tigiria	Orissa	23	23,637	4,048,000
Jan 1 1948	Bastar, Changbhaka, Chhuikhadan, Jashpur, Kankar, Kawardha, Khairagarh, Korea (Koriya), Makrai, Nandgaon, Raigarh, Sakti, Sarangarh, Surguja, Udaipur (Dharamjaigarh)	Central Provinces & Berar	16	31,598	2,820,000
Jan 2 1948	Makrai	Central Provinces & Berar	1	151	14,000
Feb 23 1948	Loharu	East Punjab	1	226	28,000
Feb 23 1948	Banganapalle	Madras	1	259	45,000
Mar 3 1948	Pudukkottai	Madras	1	1,185	438,000
Mar 3 1948	Dujana	East Punjab	1	91	31,000
Mar 8 1948	Akalkot, Aundh, Bhor, Jamkhandi, Jath, Kurundwad (Junior), Kurundwad (Senior), Mudhol, Ramdurg, Sangli, Janjira, Phaltan, Savanur, Savantwadi, Wadi Jagir, Miraj (Senior), Miraj (Junior)	Bombay	17	7,651	1,693,000
Apr 7 1948	Pataudi	East Punjab	1	53	22,000

Table 6.3, continued

Date	States Merged into Preexisting Province	Province	#	mi^2	Population
May 18 1948	Seraikella, Kharsawan	Bihar (they were originally merged with Orissa)	2	623	205,000
Jun 10 1948	Balsinor, Bansda, Baria, Cambay, Chhota Udaipur, Dharampur, Jawahar, Lunawada, Rajpipla, Sachin, Sant, Idar, Radhanpur, Vijayanagar, Palanpur, Jambhugodha, Surgana and 127 thanas, estates, and talukas in Gujarat	Bombay	144	17,680	2,624,000
Nov 6 1948	Danta	Bombay	1	347	31,000
Jan 1 1949	Mayurbhanj	Orissa	1	4,034	991,000
Jan 5 1949	Sirohi	Bombay (later partitioned between Bombay and Rajasthan)	1	1,994	239,000
Mar 1 1949	Kolhapur	Bombay	1	3,219	1,092,000
May 1 1949	Baroda	Bombay	1	8,236	2,855,000
Apr 4 1949	Sandur	Madras	1	158	16,000
Aug 8 1949	Tehri-Garhwal	United Provinces	1	4,516	397,000
Oct 15 1949	Benares	United Provinces	1	866	451,000

Table 6.3, continued					
Date	**States Merged into Preexisting Province**	**Province**	**#**	**mi^2**	**Population**
Dec 1 1949	Rampur	United Provinces	1	894	477,000
Jan 1 1950	Cooch Behar	West Bengal	1	1,321	641,000
Totals			**216**	**108,739**	**19,158,000**

Special Cases of Accession to the Union

Jammu and Kashmir

A Hindu leader, or Maharaja, ruled over the 60% Muslim region of Jammu and Kashmir. Irregular fighters who favored accession to Pakistan and Pushtoon tribesmen invaded the state with Pakistan's blessing. The Maharaja asked India to intervene, but the Union insisted on a signed IOA in return. The Maharaja agreed, but the Union added the proviso that the people of the region would have the opportunity to choose their destiny in a plebiscite, once the Indian and Pakistani forces has ceased fighting and withdrawn. The Union may have thought that it would have an easier time convincing the people than the Maharaja. India and Pakistan agreed to lines of control and a ceasefire, but the region remains divided. As of 2019, the referendum had not occurred. Hence when this section speaks of Jammu and Kashmir it means the parts under Indian control.

Jammu and Kashmir signed the initial standard IOA but did not become part of a unitary India through a merger agreement or a modified IOA. In other words, Jammu and Kashmir experienced one federal moment rather than two. From 1928 it had its own high court from which appeals could be made to the Privy Council before 1939 and to the Supreme Court thereafter. This arrangement differed from that found among the other princely states only insofar of its formality; the Maharaja may have lost direct control over the judiciary, but the princely state did not. After 1928, the British Government did not start appointing Jammu and Kashmir's judges or begin paying the salaries of those judges.

Table 6.4 - States and Mergers of States Converted into Centrally Administered Areas					
New State	**Number of Merged States**	**Merged States (if applicable)**	**Date**	**Area (mi^2)**	**Population**
Himachal Pradesh	21	East Punjab Hill States: Baghal, Baghat, Balsan, Busharh, Bhaji, Bija, Chamba, Darkoti, Dhami, Jubbal, Keonthal, Kumarsin, Kunihar, Kuthar, Mahlog, Mandi, Mangal, Sangri, Sirmur, Suket and Tarog and dependencies	3.8.48 (signed) 4.15.19 (inaugurated)	10,600	935,000
Bilaspur	1	Bilaspur	10.12.48 (signed)	453	110,000
Kutch	1	Kutch	5.4.48 (signed) 6.1.48 (inaugurated)	17,249	501,000
Bhopal	1	Bhopal	4.30.49 (signed) 6.1.49 (inaugurated)	6,921	785,322
Tripura	1	Tripura	10.15.49 (inaugurated)	4,049	500,000
Manipur	1	Manipur	9.21.49 (signed) 10.15.49 (inaugurated)	8,620	512,000
Vindhya Pradesh	35	States known as Bundelkhand and Baghelkhand: Rewa, Panna, Datia, Orchha, Ajaigarh, Baoni, Baraundha, Bijawar, Chhatarpur, Charkhari, Maihar, Nagod, Samthar, Alipura, Banka-Pahari, Beri, Bhaisunda (Chaube Jagir), Bihat, Bijna, Dhurwai, Garrauli, Gaurihar, Jaso, Jigni, Khaniadhana, Kamta Rajaula (Chaube Jagir), Kothi, Lugasi, Naigawan Rebai, Pahra (Chaube Jagir), Paldeo (Chaube Jagir), Sarila, Sohawal, Taraon (Chaube Jagir), Tori-Fatehpur (Hasht-Bhaiya Jagir)	4.15.49 (taken over by central government) 1.1.50 (officially made centrally administered area)	24,600	3,569,455
Total	**61**			**63,704**	**6,925,777**

The Maharaja of Jammu and Kashmir appointed the judges of the High Court while the state paid their salaries, until 1956. At that date, well after the establishment of the Indian federation, the legislature of Jammu and Kashmir harmonized the arrangement of its judiciary with that of the rest of the Union by adopting a state constitution in which it transferred the appointment prerogative to the national President. In other words, as with other coming together federal processes, Jammu and Kashmir retained control over its judiciary, even though it ceded its prerogatives. While the Union government has reduced the region's measure of the extra autonomy it had in 1950, the state remains connected to the center as a federal unit rather as a federal territory under central control.

"Putting Together" Federalism – Using Coercion to Create a Federation

"Putting Together" Federalism: Hyderabad

Hyderabad chose to remain autonomous from both Pakistan and India, but its independence did not last long (Raghavan 2010). Its ruler, Nizam VI, agreed to a SSA in November 1947, but he declined an initial IOA. Ostensibly, the later would have left Hyderabad with the choice to stay separate from the Union if it chose not to ratify the Constitution that the constituent assembly had only begun to draft (Copland 1997, 256). Even though its status as a parliamentary monarchy gave Hyderabad more than the patina of democracy, one of the Nizam's ancestors had signed the original treaty with Great Britain when the state was far less democratic. Thus, at least formally, only the Nizam could alter the treaty with the British or adopt a treaty with the Indian Union.

But the Nizam intended dominion status for Hyderabad, being part of the British Commonwealth but freed from domination by the Indian Union dominion. Hyderabad's becoming a dominion proved far more difficult than the Nizam realized. Overtly, the British had given the Nizam every reason to believe this possible. But covertly the Raj

had long since decided that returning paramountcy to the princely states would mean relinquishing any responsibility to protect them and leaving the princely states to fend for themselves. But the Nizam did make two choices that prolonged Hyderabad's independence. The Nizam did not know it at the time, but the subsequent experiences of the princely states that had signed both an SSA and IOA would demonstrate the wisdom of not taking the interim government's assurances at face value. Notwithstanding its adoption of a preliminary SSA and IOA, any princely state could putatively opt out of becoming part of the Union. By requiring the Union to withdraw its troops from Hyderabad as a condition of signing the SSA, the Nizam forestalled Hyderabad's surrender to the Union.

But the list of factors that would undermine the Nizam's hopes for a dominion of Hyderabad did not end there. The Nizam, a Muslim, ruled over a population 65% Hindu, and he failed to see the way in which the British Raj's umbrella had mollified that Hindu majority's discomfort being ruled by a Muslim. During the Raj, the Hindu majority did not fear mistreatment by a Muslim ruler, because of British oversight. They knew, moreover, that removing the Nizam would have risked losing the British. Once that protective British canopy disappeared, so too did that particular incentive to accept the Nizam's rule of Hyderabad. But when independence occurred on August 15, 1947, Hyderabad's Hindu dominated legislature, with the help of both the Indian Congress Party and the Communist Party of India, began calling, agitating, and demonstrating for the Nizam to resign or have Hyderabad join the Union. Change in Hyderabad's status also encouraged the Telangana minority to intensify the communist rebellion it started in 1945, and that redoubling of their efforts translated into greater success against the Nizam's forces. Composed almost entirely of poorly-trained Muslim aristocrat soldiers

called *Razakars*, the Nizam's irregular militias would also fail later at a much more crucial task.

The military invasion that the Indian government code-named "Operation Polo" achieved effective control over Hyderabad after only five days, September 13 to 17, 1948. At that moment the Nizam's standing army comprised only 30,000 soldiers, in part because Britain's protection of Hyderabad during the Raj obviated larger numbers of its own forces. Hindu resignations from Hyderabad's military also shrank Hyderabad's regular forces. The Nizam bolstered those regular forces with 200,000 irregular Razakar soldiers. The Union government sent an invasion force of only 30,000. But just one of those fighters, with British training and combat experience from WWII, counted for two or three of the Nizam's soldiers. The interim government's warriors also had superior military equipment that multiplied their effectiveness. Fighting between the forces of the Nizam and the Union unfortunately gave way to communal violence in Hyderabad. Most likely in the form of Hindu reprisals against Muslims, upwards of two hundred thousand people died.

"Putting Together" Federalism: Junagadh

When independence came on August 15, 1947, Junagadh had acceded to neither India nor Pakistan. On September 17, 1947 it opted to sign an IOA with Pakistan. First India erected a blockade that reduced the popularity of its ruler. When the ruler fled to Pakistan, India invaded and turned the state into a centrally controlled chief commissioner's province (Raghavan 2010). India later conducted a referendum the legitimacy of which remains disputed (Ankit 2016).

"Putting Together" Federalism: Other States

Other princely states signed with Pakistan or declined to join either of the new dominions, but the Indian government employed various means to put those territories into the Union. The Indian Union also transformed federal relationships with the center into unitary ones:

> The first thing the new government did, in defiance of the settlement of August 1947, was to occupy the vacuum left by the departing British. They sent regional commissioners - residents in all but name - to Rajkot and Sambalpur; 'advised' Holkar to sack his dewan, Horton, and other rulers to give way to demands for constitutional change; detained the raja of Faridkot when he tried to decamp to Australia; told Jodhpur to cut down on his consumption of whisky and to stop playing around with women; and forced Alwar to step down pending inquiries into allegations that he had abetted Gandhi's assassin. They took control of the border states of Cutch, Tripura and Manipur (on grounds of security) and took charge of the administration in Nilgiri and Bharatpur (on the pretext of an impending breakdown in law and order). (Copland 1997, 262)

The Union's coercive treatment of Jammu and Kashmir, Junagadh, Hyderabad, and other princely states defies both the "coming together" and "holding together" types of federal formation. But whether the Union chose centralized control or allowed the conquered state to have a federal relationship with the center, these "putting together" moments did not constitute a violation of India's overall trajectory of a "coming together" moment followed by a "holding together" moment.

Mysore: India's Lone Exception to the Rule that "Coming Together" Federalism Creates Centralized Judiciaries

The princely state of Mysore looks like the proverbial social scientific "Switzerland" of India's federalization process. It seems to be the unique violator of the argument of this chapter. During the federalization process Mysore experienced "coming together" with the rest of the Union. It maintained legislative and executive autonomy from the center in various domains of policy, even as it transferred some of its

prerogatives to the central government. But even before the adoption of the Constitution, Mysore capitulated control over its judiciary to the interim central government. Mysore never connected to the central government as anything but a federal unit. At the exact moments both before and after the activation of the Constitution, Mysore retained federal autonomy.

Mysore's trajectory through the process of independence avoided all of the many ways in which the other princely states became part of the unitary state under the interim government. Because of its size, the central government chose not to merge it with a province or another princely state. The Union did not have to invade it to make it part of the Indian dominion. Mysore was the only princely state whose 1) ruler signed a preliminary IOA, 2) delegates participated in the Constituent Assembly almost from the start, and 3) leaders acceded to the Union via a moment of "coming together" federalism. But the details of that last observation merit closer examination.

Mysore's Maharaja signed a preliminary IOA on August 9, 1947 and a supplementary IOA on June 23, 1948. The first IOA handed over external relations, communications, and defense to the Union. As with all of the other standard preliminary IOA's, it ostensibly reserved Mysore's right to forego the Union if the state did not approve of the form that the Constitution ultimately took. The supplementary IOA, signed before the completion of the Constitution, transferred all of the first and third Legislative Lists policy domains in the Government of India Act 1935 from Mysore to the interim government.

The IOA's provisions did not function in the context of those portions of the Government of India Act 1935 that affected the provinces. In other words, whereas the Governor-General and his representatives in the provinces could veto any provincial legislation and override any of the administrative decisions made by the indigenous

executive power in a province, Mysore's legislature and executive retained their autonomy. The interim central government did not relinquish those veto and override powers that inhered in the 1935 Act, but as a princely state Mysore never functioned under such direct supervision. In theory the Resident for the princely state could override domestic executive and legislative decisions in Mysore, but the princely states always had much more domestic autonomy than the provinces. In fact, the princely states had genuine domestic autonomy, but the provinces did not. Britain's transfer of power to India's interim government did not change this distinction.

The IOA did stray from the standard supplemental IOA's inasmuch that it prohibited the interim central government from taxing anyone or anything in Mysore. Because it would only last until the adoption of the Constitution, this caveat did not prevent the drafters from adopting provisions empowering the Union to levy taxes in Mysore. If any doubt remained as to Mysore's continuous status as a federal unit in its relationship to the central government, Mysore's temporary retention of these tax prerogatives—that the center allowed no other state or province have—makes it irrefutable.

Even if we must concede that Mysore does in fact violate the fundamental argument about "coming together" federal moments, Mysore constituted the only exception. Only outmatched by Hyderabad, Mysore comprised the second largest state in terms of geography, population, and GDP, but even Hyderabad would have only held nineteen seats. Mysore originally held seven of the ninety-three princely state seats in the Constituent Assembly, but well before the delegates approved the Constitution, Mysore's seven votes constituted the only remaining princely state votes and the only "coming together" voice in the drafting process. While all of the other princely states had their seats mixed and reorganized with those of both the provinces and other princely states,

Mysore retained all seven votes during the entire Constituent Assembly. But after the interim government folded all of the other princely states into a unitary system, Mysore held only seven of the two hundred ninety-nine seats in the entire assembly. After the partition and the reorganization of the princely states, the provinces held two hundred thirty-two and the princely states ninety-three, but only Mysore's seven of those ninety-three truly remained votes made on behalf of princely states. The other eighty-six no longer belonged to the princely states but to the various provinces and unions into which the Union government had merged them. These new entities, to which those votes belonged, had a unitary rather than federal relationship with the center.

Table 6.5 – Princely States Combined and Converted into Unions of States

New State (Union)	#	States	Date	Area (mi^2)	Pop.
Saurashtra	217	Nawanagar, Bhavnagar, Porbandar, Chrangadbra, Morvi, Gondal, Jofrabad, Rajkot, Wankaner, Palitana, Dhrol, Chuda, Limbdi, Wadhwan, Lakhtar, Sayla, Vala, Jasdan, Amarnagar, (Thandevli), Vadia, LAthi, Muli, Bajana, Virpur, Maliya, Kotda-Sangani, Jetpur, Bilkha, Patdi, Khirasra	2.15.47	21,062	3,556,000
Vindhya Pradesh (later centrally administered)	(35)	Rewa, Panna, Datia, Orchha, Ajaigarh, Baoni, Baraundha, Bijawar, Chhatarpur, Charkhari, Maihar, Nagod, Samthar, Alipura, Banka-Pahari, Beri, Bhaisunda (Chaube Jagir), Bihat, Bijna, Dhurwai, Garrauli, Gaurihar, Jaso, Jigni, Khaniadhana, Kamta Rajaula (Chaube Jagir), Kothi, Lugasi, Naigawan Rebai, Pahra (Chaube Jagir), Paldeo (Chaube Jagir), Sarila, Sohawal, Taraon (Chaube Jagir), Tori-Fatehpur (Hasht-Bhaiya Jagir)	3.12.48 to 4.4.48	24,600	3,569,000
Rajasthan	18	Jodhpur, Jaipur, Bikaner, Jaisalmer, Alwar, Bharatpur. Dholpur, Karauli, Banswara, Bundi, Dungarpur, Jhalawar, Kishengarh, Kotah, Partabgarh, Shahpura, Tonk, Udaipur	4.7.49	128,424	13,085
Madhya Bharat	25	Alirajpur, Barwani, Dewas (Senior), Dewas (Junior), Gwalior, Indore, Jaora, Jhabua, Khilchipur, Narsinharh, Rajgarh, Ratlam, Sailana, Sitamau, Jobat, Kathiawara, Kurwai, Mathwar, Piploda, Muhammadgarh, Pathari, and the Bhumia Estates of Nimkhera, Jamnia, and Rajgarh.	6.15.48	46,710	7,141,000
Patiala and East Punjab States Union	8	Patiala, Kapurhhala, Malerkotla, Faridkot, Nabha, Jind, Nalagarh, and Kalsia	8.20.48	10,099	3,424,000
Travancore and Cochin	2	Travancore and Cochin	7.1.49	9,155	7,493,000
Total	**275**		**215,450**		**34,699,000**

ELECTION OF THE CONSTITUENT ASSEMBLY

The form of the electoral process by which the country chose delegates for the Constituent Assembly reflects the assembly's nature as a constitutional convention for a federal moment of "holding together." Elections took place before the adoption of the India Independence Act of 1947. In line with most other federal moments of "holding together," moreover, the current ordinary legislature served as the constitutional convention. The 1946 elections for the Assembly's initial arrangement of 398 seats allotted them roughly proportional to the populations of the various political units. Some malapportionment played a role in giving the princely states 93 seats, but once the Muslim League left, the 208 provincial delegates constituted over two-thirds of the seats in the Assembly.

Admittedly, Indians did not choose these representatives directly. Instead, directly elected provincial assemblies chose the delegates to the Constituent Assembly. But it would be a mistake to infer that the indirectness of the elections meant a moment of "coming together." Those provinces still lacked any autonomy from the center. The central government had to approve any laws that their legislatures passed, a representative of the Union supervised every decision that their executives made, and the national government controlled their judiciaries. The indirect selection of the provincial delegates to the Constituent Assembly does clarify the variations in importance among the institutions extant during India's federal moments. It did not matter that the people in the provinces elected the provincial assemblies that selected the delegates to represent those provinces in the Constituent Assembly.

The Distribution of Princely State Representation in the Constituent Assembly

According to the Cabinet Mission's statement of May 16, 1946, the distribution of the 93 seats reserved for the Princely States would result from negotiations between the Princely States and the British India section of the Constituent Assembly. The Cabinet Mission had, nevertheless, tentatively suggested how to divide those seats. Whereas the British India section could negotiate as one unit, the princely states were not able to do so as effectively. With only 93 seats available, an additional seat for one princely state would mean one less seat for a different princely state. Among themselves, the more populated states could come to an agreement more easily because they knew that they had guaranteed representation in the assembly. A representative organization of Indians from the princely states called the All India States Peoples' Conference had taken the position that only princely states with at last one million people and income of at least a half million rupees could become self-contained units within the Union. All of the smaller princely states would have to join an existing province or merge into larger princely states.

The members of the Chamber of Princes tried to negotiate as one unit by creating a committee that would bargain with the central government. But unlike the Union, the princes still had to negotiate among themselves. Somewhat counterintuitively, the smaller number of princely rulers vis-à-vis the representatives of the provinces made it more difficult for the princely states to act as one body. The large number of provincial representatives meant that pleasing any one member was unnecessary, and the members recognized how unwieldy it would be to negotiate through anything larger than the assembly's States' Negotiating Committee. The Chamber of Princes, on the other hand, had too few members to experience the same unifying effect and too many members to make internal agreement sufficiently easy. As the process dragged on, some princely

states chose to go their own way. On February 8, 1947 the Dewan (prime minister) of Baroda followed the orders of his ruler and made public the intention to negotiate directly with the Constituent Assembly's States Negotiating Committee. The Maharaja of Cochin also announced that state's decision to join the Constituent Assembly. Still, an announcement to join did not constitute actually seating their representatives. As these states left, the groups inside the Chamber of Princes that wanted to concede as little as possible to the Union lost more and more of their leverage.

On April 1, 1947, the Standing Committee of the Chamber of Princes adopted a resolution according to the preferences of the Bhopal group of princes. It advocated joining the Constituent Assembly only at the union stage, which would be the final stage. The next day, April 2, 1947, further discussions led to a compromise resolution that allowed any princely state to join the Constituent by seating its representatives. Moreover, any final decisions on behalf of the states required a preliminary assent by the Constitutional Advisory Committee of the Chamber of Princes and then final approval by the entire group of princely states. Hence the negotiating committees of the two sides had reached an agreement.

In response, Nehru argued that this agreement did not require that the Constituent Assembly ratify it before any princely state takes its seat. For Nehru, the agreement between the Negotiating Committees of the Constituent Assembly and the princely states respectively, sufficed. Nehru's characterization of the situation further crystallized the split between the princely states that wanted to join the Constituent Assembly and the Union per their own preferences and those that wanted to wait and join simultaneously. The joiners sought to have influence in the constitutional convention as a whole and in its individual committees. The anti-joiners were not opposed to joining, but they wanted more formal and binding assurances for princely state autonomy from which the

Constituent Assembly could not renege. When the leader of the anti-joiners, the Nawab of Bhopal, implored the joiners to use their committee positions in the Constituent Assembly to advance the general interests of all of the Princely States, the Maharaja of Patiala made it clear that the interests of his individual state superseded those putatively shared by the princely states collectively.

The resolution between the two committees had many aspects that weakened the negotiating position of the princely states. First, while it insisted that the Chamber of Princes would have to approve unanimously any final arrangement of their autonomy vis-à-vis the central government, this mechanism of a concurrent majority begged two related crucial questions. First, why would the princely states be capable of unanimous agreement in the future when they were incapable of it in the present? Discussions between the early-joiners and the later-joiners only clarified their disagreements and galvanized the joiners in their resolve to act unilaterally in defense of their interests. If they were not capable of unanimous agreement when the moment for final ratification came, why would any princely state fulfill its commitment to defer to the will of the majority in the Chamber of Princes? Certainly the incentives did not favor unity among the princely states. States that entered the Constituent Assembly earlier, thereby securing influential positions on committees, would resist any attempt by the Chamber of Princes to veto the constitution's final arrangement of autonomy.

By then those states would have used their early positions of influence to gain concessions advantageous to their particular states; in return, the provinces would have conceded those advantages to those princely states as rewards for joining the Constituent Assembly in defiance of the Chamber of Princes. Not only would such benefits entice them into the Assembly, but they would also motivate them to stay. Those concessions would signal the other states to join lest they forego those benefits. The states that joined

later and had less influence in the Constituent Assembly would have had far less influence in the arrangement of princely state autonomy and have had more incentive to veto the final constitution. Since the constituent assembly had not ruled out asymmetrical federalism, the adoption of institutional inequalities among the princely states—in terms of both representation at and autonomy from the future central government—remained a possibility. The interim government could reward certain princely states without having to reward others.

Second, the agreed resolution between the two negotiating committees, notwithstanding Nehru's characterization of it, could have empowered the Constituent Assembly to insist that it was not binding. According to its language, the Chamber of Princes had the right to reject being governed according to the final constitution. They could do this if a majority of the Chamber of Princes agreed that the constitution did not fulfill the promises of the joint resolution of the Negotiating Committees. The ambiguity of the resolution, moreover, meant that a majority of the Chamber could veto the constitution even if the charter did in fact objectively comply with those guarantees. If the Instruments of Accession allowed the Princely States to join the Assembly and simultaneously reserve their approval of the new constitution, their counterpart—the interim government of the provinces—retained the same prerogative. If the Assembly produced a constitution that the provinces did not like, they could refuse to join with the princely states.

Variations in Princely State Participation in the Constituent Assembly

The first representatives from the princely states took their seats in the Constituent Assembly on April 28, 1947, but even some of the states that sent representatives did not send the full number that they could have. Udaipur filled just one of its two seats, and

Jaipur left one of its three slots empty. Baroda sent only two of its three representatives because the death of W. K. L. Mazumdar created a vacancy. The representative from the Residual States Group did not arrive until July 24, 1947. Vijay Lakshmi Pandit did not arrive until December 17, 1946, to represent the United Provinces. Hyderabad, the largest princely state, did not send anyone to fill its sixteen seats. When the interim government finally decided to invade it, most of the Constituent Assembly was over, and the central simply did not send representatives on behalf of Hyderabad. If instead Hyderabad had agreed to the initial IOA, retained the same level of autonomy from the center as Mysore did, and participated in the Constituent Assembly, it could have served as a powerful advocate for decentralization. It would have contributed a significant element of "coming together" to the federalizing process.

Representation of the Provinces in the Constituent Assembly

The provinces sat all two hundred and eight of their delegates on the first day of the constituent assembly, December 9, 1946: Madras (43), Bombay (19), Bengal (26), United Provinces (42), Punjab (12), Bihar (30), Central Provinces and Berar (14), Assam (7), Northwest Frontier Province (2), Orissa (9), Sind (1), Delhi (1), Ajmer-Merwawa (1), and Coorg (1). Their overwhelming numbers meant that they would dominate the constituent assembly, but the temporary absence of princely states and the permanent absence of the Muslim League not only meant that "holding together" would characterize India's ultimate federal moment. It also signified that "holding together" would dominate the early crucial discussions in the constituent assembly from which so many later decisions would be path dependent. Muslims were not entirely absent. Four Muslim members of the Assembly participated as provincial representatives for Delhi, Ajmer-Merwara, Coorg (near Madikeri), and British Baluchistan. This raised the total presence

of the provincial contingent to two hundred eleven out of two hundred eighty four. The other seventy-three belonged to the Muslim League and would never participate.

Muslim Representation in the Constituent Assembly

When the Muslim League achieved only seventy-three seats to the Congress Party's two hundred and eight, it demanded a separate constitutional convention for an independent Muslim dominion within the British Commonwealth. Some of those provinces were still under direct colonial control as exercised by British Chief Commissioners. Those commissioners answered to the interim central government. The Muslim League boycotted the Constituent Assembly at its inception on December 6, 1946, but until the partition was official in June of 1947, the working documents in the Assembly indicated a constitutional design with a weak center and strong provinces. In fact, as late as January 1947, the working draft gave only enumerated powers to the center and all residual powers to the states. Muslim leaders had hoped that the election results would have revealed that its minority population was bigger, but after the returns dashed those hopes, the Muslim League insisted on malapportioned representation that would have given them equality with the Congress Party.

Table 6.6 – A Timeline of Arrivals to the Constituent Assembly by the Delegates from the Princely States

Date	Total	Names	New Arrivals	#
4.28.47	Baroda (2 of 3), Cochin (1 of 1), Udaipur (1 of 2), Jaipur (2 of 3), Jodhpur (2 of 2), Bikaner (1), Rewa (2 of 2), Patiala (2 of 2)	Sir Brojendra Lal Mitter (Baroda), Mr. Gopaldas Ambaidas Desai (Baroda), Mr. P. Govinda Menon (Cochin), Sir T. Vijayaraghavacharya (Udaipur), Sir V. T. Krishnamachari (Jaipur), Pandit Hiralal Shastri (Jaipur), Mr. C. S. Venkatachar (Jodhpur), Mr. Jainarayan Vyas (Jodhpur), Sardar K. M. Panikkar (Bikaner), Raja Lal Shiva Bahadur Singh, Rao of Churhat (Rewa), Mr. Lal Yadhendra Singh (Rewa), Sardar Jaidev Singh (Patiala), Sardar Gian Singh Rarewala (Patiala)	Only 2/3 for Baroda, Only 1/2 Udaipur, Jaipur (2/3), Cochin (1/1), Rewa 2/2, Patiala 2/2, Jodhpur (2/2), Bikaner (1/1)	12
7.14.47	Mysore (7/7), Gwalior (4/4), Baroda (3/3), Udaipur (2/2), Bikaner (1/1), Jaipur (3/3), Patiala (2/2), Alwar (1/1), Kotah (1), Sikkim and Cooch-Behar Group (1/1), Tripura, Manipur, and Khasi States Group (1/1), Rampur and Benares (United Provinces States Group)(1), Eastern Rajputana States Group (1), Cochin (1/1), Rewa 2/2, Patiala 2/2, Jodhpur (2/2), Eastern States Group (4), Residual States Group (1)	**Mysore:** 44. Dewan Bahadur Sir A. Ramaswamy Mudaliar, 45. Mr. K. Chengalarya Reddy, 46. Mr. H. R. Guruv Reddy, 47. Mr. S. V. Krishnamurthi Rao, 48. Mr. H. Chandrasekharaiya, 49. Mr.Mahomed Sheriff, 50. Mr. T. Channiah. **Gwalior:** 51. Mr. M. A. Sreenivasan, 52. Lt. Col. Brijraj Narain, 53. Shri Gopikrishna Vijavargiya, 54. Shri Ram Sahai. **Baroda:** 55. Mr. Chunnilal Purshottamdas, Shah. **Udaipur**: 56. Dr. Mohan Sinha Mehta, 56. A. Mr. A. Manikyalal Varma. **Jaipur**: 57. Raja Sardar Singhji Bahadur of Khetri. **Alwar**: 58. Dr. N. B. Khare. **Kotah:** 59. Lt.-Col. Kunwar Dalel Singhji. **Patiala:** 60. Sardar Jaidev Singh. **Sikkim & Cooch Behar:** 61. Mr. Himmat Singh K. Maheshwari. **Tripura, Manipur, and Khasi States:** 62. Mr. G. S. Guha. **Rampur and Benares (United Provinces Group):** 63. Mr. B. H. Zaidi. **Eastern Rajputana States:** 64. Maharaja Mandhata Singh. 65. Maharaj Nagendra Singh. 66. Mr. Gokul Bhai Bhatt. **Western India & Gujarat States**: 67. Col. Maharaj Shri Himmat Singhji. 68. Mr. A. P. Pattani. 69. Mr. Gaganvihari Lalubhai Mehta. 70. Mr. Bhawanjee Arian Khimjee. 71. Khan Bahadur Pheroze Kothawala. 72. Mr. Vinayakrao B. Vaidya. **Deccan States:** 73. Mr. M. S. Aney. 74. Mr. B. Munavalli. **Eastern States**: 75. Rai Sahab Raghuraj Singh **(Orissa States)**, Rai Bahadur Lala Raj Kanwar **(Orissa States)**, Mr. Sarangdhar Das **(Orissa States)**, 78. Mr. Yudhisthir Misra **(Orissa States)**: **Residual States Group:** 79. Mr. Balwant Rai Gopalji Mehta **(later Saurashtra)**	Mysore (7/7), Gwalior (4/4), Baroda (1/3), Udaipur (2/2, 1 new, 1 substitute), Jaipur (1/3), Patiala (1/2, 1 substitute), Alwar (1/1), Kotah (1), Sikkim and Cooch-Behar Group (1/1), Tripura, Manipur, and Khasi States Group (1/1), Rampur and Benares (United Provinces States Group)(1), Eastern Rajputana States Group (1), Western India States Group (4/4), Gujarat States Group (2/2), Deccan and Madras States Group (2/2), Eastern States Group (4/4), Residual States Group (1)	47

Table 6.6, continued

Date	Total	Names	New Arrivals	#
7.15.47	Eastern States Group III (1), Central India States Group (1)	2. Mr. N. Madhava Rao (Eastern States Group-III, Orissa States Group), 3.Rao Raja Jayendra Singh Ju Deo (Central India States Group, Charkhari, Bundelkhand).	Eastern States Group III (1), Central India States Group (1)	49
7.16.47	Eastern States Group	Mr. Kishori Mohan Tripathi (Central States Group); Mr. Ram Prasad Potai (Central States Group, Chhattisgarh).	Central States Group (2)	
7.22.47		Mr. Jai Sukh Lal Hathi (Residuary States Group, later Saurashtra)	Residuary States Grp (1)	
7.24.47		Kunwar Shamsher Jang. (Residuary States Group)	Residuary States Grp (1)	
7.28.47		Pandit Chaturbhuj Pathak (Central India States Group), Major Maharaj Kumar Pushpendra Singhji (Central India States Group)	Central India States Grp (2)	
8.20.47		Shri A. B. Latthe (Kolhapur State), Chaudhri Nihal Singh Taxak (Punjab States Group 3)	Kolhapur State (1); Punjab States Group 3 (1)	
8.21.47		H. H. Raja Anand Chand (of Bilaspur) (Punjab States). (1)		
First Meeting Since the Partition and Reorganization				
1.27.48		(1) Shri K. Hanumanthiah (Mysore State); (2) Shri T. Siddalingaiah (Mysore State); (3) Shri V. S. Sarvate (Indore State)		
11.4.48		(1) Shri H. Siddaveerappa (Mysore State); (2) Mr. K. A. Mohammed (Travancore State); (3) Shri R. Sankar (Travancore State); (4) Shri Amritlal Vithaldas Thakkar [United State of Kathiawar (Saurashtra)]; (5) Shri Kaluram Virulkar [United State of Gwalior, Indore, Malwa (Madhya Bharat)]; (6) Shri Radhavallabh Vijayavargiya [United State of Gwalior, Indore Malwa (Madhya Bharat)]; (7) Shri Ram Chandra Upadhyaya (United State of Matsya); (8) Shri Raj Bahadur (United State of Matsya); (9) Thakar Krishna Singh (Residuary States); (10) Shri V. Ramaiah (Madras States); (11) Dr. Y. S. Parmar (Himachal Pradesh).		
11.5.48		2. Shri P. S. Rau (Jodhpur).		
11.6.48		Shri Ratna Lal Malaviya (C. P. and Berar States).		
11.15.48		1. Shri P. S. Nataraja Pillai (Travancore).		

Table 6.6, continued

Date	Total	Names	New Arrivals	#
11.17.48		1. Shri B. H. Khardekar (Kolhapur State).2. Shri A. Thanu Pillai (Travancore State).		
11.18.48		1. Dr. Jivraj Narayan Mehta (Baroda); 2. Shri Chimanlal Chakkubhai Shah, United States of Kathiawar (Saurashtra).		
11.29.48		Shri Balwant Singh Mehta (United State of Rajasthan); Lt. Col. Dalel Singh (United State of Rajasthan).		
12.6.48		Shri K. Chengalaraya Reddy (Mysore).		
12.8.48		Shri Manikya Lal Verma (United State of Rajasthan); Shri Gokal Lal Aawa (United State of Rajasthan)		
12.29.48		1. Shrimati Annie Mascarene (Travancore); 2. Shri Sita Ram Jaju, [United State of Gwalior-Indore- Malwa (Madhya Bharat)].		
May 16 1949		(2) Sardar Suchet Singh (Patiala and East Punjab States); (3) Shir Kaka Bhagwant Roy (Patiala and East Punjab States).		
5.31.49		Sardar Ranjit Singh [Patiala and East Punjab States Union.]		
Jun 16 1949		(1) Sheikh Mohd. Abdullah. [Kashmir]; (2) Mirza Mohd. Afzal Beg; (3) Maulana Mohd. Syeed Masoodi; (4) Shri Moti Ram Bagda.		
10.7.49		Shri Samaldas Laxmidas Gandhi: (Junagadh then Saurashtra).		
11.15.49		Thakur Lal Singh (Bhopal State).		
Nov 24 1949		1. Captain Awadesh Pratap Singh; 2. Shri Shambu Nath shukla; 3. Pandit Ram Sahai Tewari; 4. Shri Mannulalji Dwivedi; United State of Vindhya Pradesh		
11.26.49	Constitution Passed by the Assembly			
Jan 24 1950		Shri Ratnappa Bharmappa Kurnbhar (Bombay States); Dr. Y. S. Parmar (Himachal Pradesh).		

Transformations of the Princely States: Implications for the Representation of the Populations of the Former Princely States in the Constituent Assembly

Each instance in which a princely state merged itself into a preexisting province was culturally, institutionally, and procedurally unique, but certain similarities emerged. The most important aspect common to all of them was the way in which the mergers undid the method of representation in the constituent assembly agreed upon by the princely states and the central government. Even though it was large enough to have its own representatives in the Constituent Assembly, Baroda, for instance, agreed to become part of Bombay province on May 1, 1949. Baroda's three delegates to the constituent assembly were now representing a Baroda contained within Bombay province, with no reason to expect that Baroda would become its own separate province. The delegates may have originally been chosen by Baroda, but their interests no longer belonged to Baroda alone. Attitudinally they were Barodians, but strategically they were now representatives of Bombay province. Independent and self-contained Baroda changed from a princely state with paramountcy into nothing more than a piece of territory within a preexisting province.

According to the Government of India Act 1935, Baroda could have exercised a right to join with the provinces, but under that scheme it would have maintained most of its domestic autonomy and all of its territorial integrity. Princely state participation in the Government of India Act 1935 would have activated that constitution's federal features. Baroda did not even maintain its territorial distinctiveness as its own province within the new Dominion of India, let alone become an autonomous federal political unit within an Indian federation. The merger agreement was not conditional on anything in return from

the Constituent Assembly. Had the Constituent Assembly never ratified a constitution, Baroda would have remained under the control of the interim government.

The interim government pursued its desire to end autocracy in the princely states by trying to persuade the princes to relinquish their ancestral rights. When offered buyouts, nearly all princes accepted their obsolescence, although some accepted it grudgingly. When India democratized all of the princely states it was simultaneously turning India unitary. The princes had signed the original IOA's to accede to the Union federally, but now they no longer controlled their states. Even those princes who stayed on as Rajpramukhs answered to the central government. Just as the consolidation of the princely states meant the end to the hybrid of a federal princely India and a centralized provincial India, so to did the end of princes as rulers mean that India became unitary.

No set of the princely states successfully banded together in order to reach an agreement with the central government as a unified bloc. Many states tried. Eight states attempted to form the Deccan Confederacy to prevent their amalgamation with other provinces and states, but they could not agree on a final constitution. Instead they reached individual agreements, one by one, to aggregate themselves into unions of princely states (Furber 1951, 352). The central government administered some of these new unions directly, but most of them became ordinary states.

The transformation of the princely states played a central role in making India unitary so that it could experience a moment of "holding together" federalism. The original Instruments of Accession (IOAs) that each prince had signed gave the central government power over only three areas (defense, communications, and foreign policy). But later the central government simply altered the arrangement. For these reasons, characterizing the negotiations in the Constituent Assembly between the princes and the central government as "coming together" does not describe the circumstances accurately.

All but one of the princely states had already become mere provinces before the final adoption of the Indian Constitution. In other words, under the interim but independent government of India, all of the princely states became part of a unitary state. A federal moment that turns a unitary state into a federation constitutes a moment of "holding together" rather than a moment of "coming together." The territories that had once been semi-autonomous princely states now existed as part of a unitary government. Just like the other provinces, they now had centrally-appointed governors who had full veto powers over the decisions of their new legislative assemblies.

Table 6.7 - Initial Distribution of Princely State Representation in the Constituent Assembly				
Order	**Name**	**# Princely States**	**Component Princely States**	**# Delegates**
1	Alwar	1	Alwar	1
2	Baroda	1	Baroda	3
3	Bhopal	1	Bhopal	1
4	Bikaner	1	Bikaner	1
5	Cochin	1	Cochin	1
6	Gwalior	1	Gwalior	4
7	Indore	1	Indore	1
8	Jaipur	1	Jaipur	3
9	Jodhpur	1	Jodhpur	2
10	Kolhapur	1	Kolhapur	1
11	Kotah	1	Kotah	1
12	Mayurbhanj	1	Mayurbhanj	1
13	Mysore	1	Mysore	7
14	Patiala	1	Patiala	2
15	Rewa	1	Rewa	2
16	Travancore	1	Travancore	6
17	Udaipur	1	Udaipur	2
18	Sikkim and Cooch Behar Group	2	Sikkim, Cooch Behar	1
19	Tripura, Manipur and Khasi States Group	28	Tripura, Manipur, Khasi States Group (Khyrium, Mylliem, Cherra, Nongstein, Rambrai, Myriam, Mobosohphoh, Nongspung, Nongkhlaw, Bhowal, Jirang, Makaram, Mawasynram, Langrin, Mawrang, Malai Sohmat, Mawphlang, Sohiong, Lyniong, Shelia Confederacy, Mawlong, Nonglwai, Pamsanugut, Mawdon, Dwara Nongtynmen)	1

Table 6.7, continued				
Order	**Name**	**# Princely States**	**Component Princely States**	**# Delegates**
20	U. P. States Group	2	Rampur, Benares	1
21	Eastern Rajputana States Group	12	Bharatpur, Tonk, Dholpur, Karauli, Bundi, Sirohi, Dungarpur, Banswara, Partabgarh, Jhalawar, Kishengarh, Shahpura	3
22	Central India States Group (including Bundelkhand and Malwa)	26	Datia, Orchha, Dhar, Dewas (Senior), Dewas (Junior), Jaora, Ratlam, Panna, Samthar, Ajaigarh, Bijawar, Charkhari, Chhatarpur, Baoni, Nagod, Maihar, Baraundha, Barwani, Ali Rajpur, Jhabua, Sailana, Sitamau, Rajgarh, Narsingarh, Khilchipur, Kurwai	3
23	Western India States Group	16	Cutch, Idar, Nawanagar, Bhavanagar, Jungadh, Dhrangadhra, Gondal, Porbandar, Morvi, Radhanpur, Wankaner, Palitana, Dhrol, Limbdi, Wadhwan, Rajkot	4
24	Gujarat States Group	16	Rajpipla, Palanpur, Cambay, Dharampur, Balasinor, Baria, Chhota Udepur, Sant, Lunawanda, Bansda, Sachin, Jawhar, Danta, Janjira, Jafrabad	2
25	Deccan and Madras States Group	14	Sangli, Savantvadi, Mudhol, Bhor, Jamkhandi, Miraj (Senior), Miraj (Junior), Kurundwad (Senior), Kurundwad (Junior), Akalkot, Phaltan, Jath, Aundh, Ramdurg	2
26	Punjab States Group I	17	Jind, Kapurthala, Bashahr, Faridot, Malerkotla, Kalsia, Nalagrath, Kaithal, Nabha, Suket, Tehri-Garhwal, Sirmur, Chamba, Malerkotla, Loharu, Bilaspur, Mandi,	3
27	Eastern States Group I	34	Panna, Datia, Orchha, Ajaigarh, Baoni, Baraundha, Bijawar, Chhatarpur, Charkhari, Maihar, Nagod, Samthar, Alipura, Banka-Pahari, Beri, Bhaisunda (Chaube Jagir), Bihat, Bijna, Dhurwai, Garrauli, Gaurihar, Jaso, Jigni, Khaniadhana, Kamta Rajaula (Chaube Jagir), Kothi, Lugasi, Naigawan Rebai, Pahra (Chaube Jagir), Paldeo (Chaube Jagir), Sarila, Sohawal, Taraon (Chaube Jagir), Tori-Fatehpur (Hasht-Bhaiya Jagir)	4

Table 6.7, continued				
Order	**Name**	**# Princely States**	**Component Princely States**	**# Delegates**
28	Eastern States Group II	14	Bastar, Surguja, Raigarh, Nandgaon, Khairagarh, Jashpur, Kanker, Korea, Sarangarh, Changbhakar, Chhuikhadan, Kawardha, Sakti, Udaipur	3
29	Residuary States Group	8	Pudukottai, Banganapalle, Sandur, Jaisalmer, Seraikela, Kharsavan, Pataudi, Dujana	4
Total		**206**	**Total**	**93**

DEBATES WITHIN THE CONSTITUENT ASSEMBLY

The Enforcement of Fundamental Rights by the Courts

Because the Assembly's deliberations about the draft constitution proceeded in the order of its sections, the first discussions of the courts took place in the context of debating what would later become the thorough delineation of fundamental rights in Part III of the Constitution. Long experience with judicial protection of basic rights may make it hard to imagine not having it, but of course the founders did not need to make the judicial enforcement of basic rights an inherent prerogative of the Supreme or High Courts. If they did not constitutionally endow some court with this role, they needed to decide whether the Union or states would have the ability to both give this power to and take it away from a court.

The Constitution emphasized fundamental rights, and because the actualization of rights at the ground level depended upon a "judicial remedy," the delegates debated the advisability of entrusting this role to any courts in addition to the Supreme Court (Vallabhbhai J. Patel, 3.21.86, Volume 3, May 2, 1947). Having decided to protect those rights through the High Courts, they did not want the states to control, oversee, or manage the High Courts. The founders mistrusted what they considered the authoritarian tendencies among those territories that the government transformed from princely states into provinces. They also worried about what they perceived as undue influence on the provincial courts by the provincial executive during the Raj. Notwithstanding their experiences with the central government's interference of the High Courts during the Raj and the interim government, they held fewer concerns about undue influence from Parliament than from the provinces. Brajeshwar Prasad went so far as arguing against

consultation with the Chief Justice of a High Court, during the selection of judge for that High Court, because that Chief Justice of that High Court owed too much to the local state government:

I am opposed to the words "in consultation with the High Court" I definitely hold the view that appointments, postings and promotions must be removed from the purview of the provincial governments. I know of cases where High Court Judges have been removed and transferred because certain members of the Congress who hold high influence in the Governments did not pull on with some judges. The High Courts did enter into controversy with the provincial governments and the High Courts were frustrated. Therefore, I am definitely of the view that this measure is not in conformity with the needs of the situation. The need is that the provincial administration must be purified, must be free from corruption, must be free from nepotism. (Brajeshwar Prasad, September 16, 1949, Volume IX, 9.142.271)

B. Pocker Sahib Bahadure shared this concern and quoted a memo written to the Constituent Assembly by both the Justice of the Federal Court and the Chief Justices of the High Courts:

> "It appears that a certain provincial Government has issued directions that the recommendations of the Chief-Justice, instead of being sent to the Premier, should be sent to the Chief-Secretary, who, in some instances, has asked the Assistant Secretary to correspond further with the High Court in the matter. Thus, there seems to be a growing tendency to treat the High Court as a part of the Home Department of the province. With a view to check this tendency which is bound to undermine the position and the dignity of the High Courts and lower them in the estimation of the public, the Judges assembled in conference were unanimously of opinion that a procedure on the following lines must be laid down for the appointment of High Court Judges: "The Chief Justice should send his recommendation in that behalf directly to the President. After consultation with the Governor, the President should make the appointment with the concurrence of

the Chief Justice of India." (B. Pocker Sahib Bahadure, May 24, 1949, Volume VIII, 8.90.19)

K. Santhanam pointed out the need to incorporate the ability to protect fundamental rights in courts closer to the people, even going so far as suggesting limits on the Supreme Court's enforcement of them:

> Which is the authority to vest it? Is it the Union legislature or the Unit legislature? I think in matters of interpretation of the Constitution or enforcement of fundamental rights the vesting of powers in the courts should be purely a Union matter and it ought not to be given to the units, because the units may particular defeat the exercise of these fundamental rights in two may different ways. For instance, if they all original jurisdiction shall be in the Supreme Court, the ordinary citizen will not be able to go up every time to the Supreme Court. Or if they vest it in the magistracy, then he will have to get redress only by way of appeal, which is always dilatory and inconvenient. Therefore, the vesting of jurisdiction is an important matter for the citizen. I think all original jurisdiction in the matter of enforcement of fundamental rights should be vested only in the High Court of the Unit. It should not be given either to inferior courts, or to the Supreme Court except in matters concerning the Unit and the Union of inter-Unit matters. Therefore the High Courts in the Units should be the lynch-pin for the enforcement of these rights. (K. Santhanam, May 2, 1947, Volume III, 3.21.85).

Rohini Kumar Chadhury vehemently opposed widening the number of veto points in the judicial appointment process. For him, allowing any part of Parliament a role would give the Prime Minister full control over nominations:

> Mr. President, I have come here purposely to warn the house against the acceptance of the suggestion made by my friend, Mr Shibban Lal Saksena. He seems to think that any appointment that is made should be subject to confirmation by two-thirds majority of the houses of parliament. I submit that this is a very dangerous principle. Confirmation by two-thirds majority of the houses of Parliament means that the appointment will be at the pleasure of the leader of the majority party. … I would therefore warn the house not to accept any proposal aimed at giving the house power to confirm the appointment of judges or agree to the suggestion that action for the removal of a judge can be taken by Parliament itself. That sort of thing should not be allowed to be accepted for a moment. (Rohini Kumar Chadhury, May 24, 1949, Volume VIII, 8.90.129)

In the context of the Congress Party's overwhelming majority this concern made sense, but as the Congress became less dominant, a two-thirds majority likely would have led to greater consensus in judicial selection.

The Constituent Assembly did consider what types of remunerated positions former judges could take. The Constitution would not let them argue before any courts in the country. They could work as attorneys but not as advocates in court. The Constituent assembly almost proscribed any remunerative professions for former judges, but then it decided otherwise:

> One other point and I shall have done. It has been stated that no office of profit should be offered to a judge in office or after retirement. I do not see much logic in this amendment. The judges of the Supreme Court are granted the highest scale of salaries, barring the Governor-General and the Governors. If at any time an office of profit under the Government is to be offered to a judge of the Supreme Court it is either the same or some other allied office involving semi-judicial functions. That being so, I do not find any justification for a restriction of the kind proposed. I do not therefore agree with those friends who hold this view. Such a proviso merely reveals a fear complex. I would appeal to my friends to give up this fear complex. (Biswanath Das, May 24, 1949, Volume VIII, 8.90.128).

Here the members spoke about on the institutional choices that would shape the strategic calculus of the judges. Wittingly or wittingly, by excising this amendment the Constituent did several things. It meant that High Court judges could take head positions in the offices of the national President or the Governor of the state in which the High Court is located. Since India's parliamentary system meant that having a cabinet position meant being elected, the Prime Minster and State Premiers could only offer a former judge the chance to run for office, perhaps for a safe seat. But a former judge could take a remunerated position just below the elected cabinet member.

Overall, the Constituent Assembly's strongest concerns entailed ensuring the independence of the judiciary. They saw the appointment process under the Raj as too

influenced by the Governor General who served as the British Government's proxy. To the delegates, that mechanism implied no separation between the judicial and executive branches. Some of the consensus views of the Constituent, and not just the views of its individual members, contradicted each other. Most of the delegates treated the memo from both the Justices of the Federal Court and the Chief Justices of High Courts as a definitive authority. They considered those judges trustworthy beyond reproach. On the other hand, they feared the involvement of the Chief Justice of a High Court in the selection of a judge. The meanings of "consult," "consent," "concur," and "advise" seemed to mean one thing when involving a Chief Justice and something else with respect to the relationship between the President and the Prime Minister. They wanted a "concurrent" role for the Chief Justice of the Supreme Court when it would stop a bad High Court appointment, but a "consultant" role when the Chief Justice might be standing in the way of an excellent High Court appointment.

The true Father of the Constitution, the genius A.B. Ambedkar, thought that the final adopted language succeeded at steering the judicial appointment mechanism safely between the two greatest threats to justice. First, it avoided the Scylla of insufficient independence from, or even slavishness to, the Prime Minister and the majority party. Second, it dodged the Charybdis of empowering the judiciary itself with a veto over judicial appointment:

> The draft article, therefore, steers a middle course. It does not make the President the supreme and the absolute authority in the matter of making appointments. It does not also import the influence of the legislature. The provision in the article is that there should be consultation of persons who are ex hypothesi, well qualified to give proper advice in matters of this sort, and my judgment is that this sort of provision may be regarded as sufficient for the moment.

> With regard to the question of the concurrence of the chief justice, it seems to me that those who advocate that proposition seem to rely implicitly both on the impartiality of the chief justice and the soundness of his judgment. I personally feel no doubt that the chief justice is a very eminent, person. But after all the chief justice is a man with all the failings, all the sentiments and all the prejudices which we as common people have; and I think, to allow the chief justice practically a veto upon the appointment of judges is really to transfer the authority to the chief justice which we are not prepared to vest in the president or the government of the day. I therefore, think that is also a dangerous proposition. (B.R. Ambedkar, May 24, 1949, Volume VIII, pg. 258, 8.90.157, and 8.90.158)

Regardless of the authority, be it the Collegium, the President, the Chief Justice of the Supreme Court, the Cabinet, or the Prime Minister, India's High Court judges have always owed their positions to just one or a combination of those elements of the national government

A DEFENSE OF INDIA AS FEDERATION

The existence of multiple scholarly objections to describing India as a federation means that this chapter cannot assume its status among the world's federations (Gangal 1962); a unitary India could not serve as a case study of a federal moment. The following defense of India's "federalness" hinges on identifying a proper conceptualization of federalism. Objections to India's federalness take one of two forms. Some challenges involve *de facto* practice in India's multilevel system (Wheare 1963, 23). Wheare called it a "quasi-federation, something between a unitary state and a federation" (Filippov, Ordeshook, and Shvetsova 2004, 214). Other criticisms focus on India's juridical status, i.e., its formal institutions (Bombwall 1967; Chanda 1965, 41; Ray 1967), regardless of actual practice. Without a doubt, the relationship between India's central government and those of its states has more in common with Venezuela's centralized federalism than with the United States' decentralized federalism. In fact, India may be the most centralized federation in the history of the world. Nevertheless, India's inclusion as a federation does

not require any changes to this project's conceptualization of federalism. In order to present a convincing case for India's federalness, the following discussion acknowledges the multiplicity of institutions that only have the appearance of federalism.

The Indian Constitution's Seventh Schedule, i.e., the entirety of Article 246, delineates three legislative lists: national, concurrent, and state. The Union government has exclusive jurisdiction to legislate in the policy domains spelled out in the national list. The Supreme Court of India has not interpreted anything akin to U.S. dormant commerce clause jurisprudence into the constitution because the existence of the Union list makes explicit the central government's exclusive jurisdiction in those policy areas. The states cannot legislate in areas reserved to the central government, even if no national legislation exists.

In the concurrent policy domains, Union supremacy overrides state legislation only when national legislation actually exists. The right of the states to legislate regarding these subjects is self-enabling. States do not have to wait for the national government to enact "organic" law broadly outlining the range of acceptable policy, the details for which the states can legislate. Figuratively speaking, in concurrent policy domains the national government determines both the floor and the ceiling while the states only get to decide how thick to make the carpet or how high to hang the pictures on the wall. In many cases the specificity of national legislation removes the legislative discretion of the states: the floor and the ceiling become one.

The state list identifies those areas for which the states have jurisdictional monopoly, but other parts of the constitution vitiate that exclusivity. Each state governor serves at the pleasure of the national president. A governor can veto state legislation once, but he must assent to a bill if his state assembly adopts it a second time. Therefore

this gubernatorial veto does not constitute one of the rules that undermines India's claim to federalism. While a state governor has a choice with respect to his veto, he must refer state legislation for presidential veto if he believes that the legislation 1) encroaches on national policy domains, 2) endangers the independence of the judiciary, or 3) violates the constitution in some other way.

A state governor decides whether legislation meets one of these criteria, giving him the ability to disguise a referral for policy reasons as a referral for constitutional grounds, but even that is not necessary. When political considerations make it prudent, he might disguise a policy related referral as a constitution related referral, but he can make a policy-based referral openly. This mechanism includes state legislation in policy domains under the state list. In rare instances, the Supreme Court has protected state legislation from national encroachment but never after a formal presidential veto.

India's status as a federation rests on the executive powers of a state's Chief Minister and Council of Ministers. Under the core-periphery systems of the Raj, interim government, and Constitution the center has paramount power with respect to all legislation. This supremacy even includes legislation on List II, the so-called state list. On Also during both the Raj and the interim government, the governors had the power to overrule the decisions of the provincial cabinets. In fact, the governor did not have to let the cabinet do anything. But under the Constitution, the governor cannot interfere with or override their activities.

CONCLUSION

Before independence, the princely states in India maintained their own judiciaries autonomously from the central government. In fact, the princely states had nearly

complete domestic autonomy, even though they had ceded communications, external relations, and defense prerogatives to the British colonial government. In contrast, the judiciaries located in the provinces of India functioned as instruments of the center, both when the British Raj controlled the national government and when the Indians achieved some measure of self-rule before independence. The Indian case is complicated by the reality that, because some princely states had acceded as federal units of the Union, the country had already become an asymmetric federation before independence.

Even though India's Constitutional Assembly may, at first glance, resemble one appropriate only to a moment of "holding together, closer examination reveals the mistake in characterizing the entire process that way. The Constituent Assembly also included a moment of "coming together" in as much that the princely states could have gone their own way as a group or as individuals. Instead, most of them negotiated with the central government of India to carve out an arrangement where they had autonomy that the provinces did not have. Those princely states only handed over control of communications, external relations, and defense. At least on paper the princely states also retained the right to reject the final Constitution and become fully independent units again. They did not capitulate their core legislative, executive, or judicial prerogatives. In all but one case (Baroda), the princely states surrendered the autonomy of their judiciaries only after the new Constitution took effect.

Perhaps the best way to understand the Indian case is to see that it does not conform perfectly to either type of federation. Most of the provinces never had an opportunity to truly separate from the rest of India. They were part of the centralized system under Great Britain's direct rule. Meanwhile, the princely states experienced federalization as "coming together" because they were part of Britain's scheme of

indirect governance. If it can be agreed that the federating process started when Great Britain made it official that it would withdraw from the region, then the Indian case partakes of both the "holding together" and "coming together" varieties.

Officially, the British government, in the form of the Indian Independence Act of 1947, gave the princely states three options: 1) join India, 2) join Pakistan, or 3) join neither. Unofficially, the British government pressured the princely states to join the new country of their choice and not to remain independent of both Pakistan and India. When India could not convince a state to join the Union, it coerced them. Oftentimes this scenario deprived the conquered princely state of all of its autonomous prerogatives. The central government took military action, for instance, to overthrow the ruler of Hyderabad and incorporate the princely state as another province of the unitary union rather than as a princely state with special autonomy.

In India, all of the princely states had autonomous control of their judiciaries, even though the central government controlled the judiciary in the rest of the Indian states. Under that federation, the regular provinces in the periphery had no *bona fide* legislative, executive, or judicial autonomy. The center funded, chose, and disciplined the courts and judges of the provincial governments. This absence of a truly decentralized judiciary in the provinces also had a strong effect on the decentralization of the judiciary within the new federation, albeit in the opposite direction. Perhaps the princely states could have kept their autonomous judiciaries and the other states could have gained control over their judiciaries, but neither of these things transpired. Instead, the princely states lost their judicial autonomy and the judiciaries of the states remained under the thumb of the central government just as the arrangement had been during the British Raj.

This occurred for several reasons. The overwhelming power of the national Congress Party meant that the political focus of the nation was on that central government rather than on the state governments. Most of the princely states needed the Union more than the Union needed them. Only one princely state may have had the clout to insist on judicial autonomy, but it resisted joining the union altogether. When the Union ultimately forced this Hyderabad into the Union, the princely state lost whatever leverage it would have had if it had simply negotiated its entrance into the Union.

During the drafting process of the new constitution, the representatives from the provinces had no experience with judicial autonomy, even though they had some experience with executive and legislative autonomy. Hence they were less inclined to ask for judicial autonomy than for executive and legislative autonomy. During both the end of the Raj and the interim government, the provinces did not have "responsible government," but they came closer to it with respect to the executive and the legislature. The judiciary remained in the hands of the central government. Moreover, representation in the constituent assembly was roughly proportional to population, and state delegations did not vote as states. Even if the princely states had insisted upon judicial autonomy, the more populous provinces were not going to give it to them.

The combined leverage of the princely states (ninety-three votes) and the Muslim League (seventy-three votes) would not have outmatched the Congress Party's two hundred eight votes, let alone defeated the total remainder of two hundred twenty-three votes. The divisions among the princely states and within the Muslim League would have made a unified front unlikely. Many groups in the princely states, moreover, favored the Congress Party and may have simply voted in the same way that the Congress Party's provincial representatives did. The institutional arrangement, of the provinces *qua* parts

of a unitary system and the princely states *qua* separate independent units, played the largest role in making India a relatively centralized federation with a unitary judicial system.

When the Spanish power collapsed in the rest of Latin America, so did the Portuguese, and the same kind of caudillo government developed as the essential units of power. This structure received formal recognition in the Additional Act of 1834, which reconstituted imperial Brazil along federal lines. This federalism was elaborated in 1889 when the republic replaced the empire. At both the beginning and at the reconstitution the threat was Portugal and Brazilian royalty, an offshoot of Portuguese royalty (see James, 1921). So federalism was a device to unite caudillos in the face of external threat and hence both the bargaining conditions were present.

—William H. Riker[71]

Most Brazilian states were not unhappy about the Brazilian Federal Republic being created in 1889. However, Brazil was an independent state and unitary empire from 1822 to 1889, and the military, after the coup overthrowing the emperor, unilaterally announced in their "Proclamation of the Republic" that the federation was formed and that the military would use force to ensure the unity of the federation. When the first federal constitution was constructed in 1891, the state of São Paulo was the hegemonic political and economic force at the Constituent Assembly.

—Alfred C. Stepan[72]
(referring to the Brazilian Federal Republic as a “coming together” federation)

[71] {Arretche:2001vd}
[72] {Stepan:2001wi, Stepan:2004th p. 36, Stepan:1999ez}

Chapter Seven

Tracing Two Processes of Federal Formation in Nineteenth-Century Brazil

INTRODUCTION

Brazilian Federalism in Light of Recent Historiography

Brazil's two federal moments during the nineteenth century confirm this project's expectations for "holding together" to generate judicial centralization and for "coming together" to generate judicial decentralization. In its moment of "holding together" from 1832 to 1834, the constitutional monarchy devolved legislative power, but not judicial or executive, power to the provinces. The creation of First Republic from 1889 to 1891 took the form of a "coming together" federal moment in which the provinces did not give up their judicial systems to the central government. In order to make this argument, the discussion has to first dispel the conventional view of these moments. The standard view of the constitutional monarchy says that it never became a federation, but this chapter presents evidence that the *Ato Adicional* and other changes to the Constitution of 1824 constituted genuine devolution. According to the most widely accepted view, the founding of the First Republic constituted a moment of "holding together" rather than one of "coming together."

Federal formation in 1834 led to a centralized judiciary, but the emergence of federalism in 1889 generated a decentralized judiciary. In the first example, Brazil's political elites altered the unitary nature of the 1824 Imperial Constitution, giving some unilateral authority to the provincial legislatures, but those elites at the center maintained the centralization of the executive and judicial functions. In the second instance, the declaration of the demise of the constitutional monarchy meant the temporary suspension of an integrated Brazil. The provinces held together loosely, temporarily, and tenuously connected to each other by a provisional military regime. That transitional period may have resembled unitarism, but it functioned as a weak confederation. Until the

representatives of the states agreed to the Constitution of the new federation in 1891, no genuine country existed. Unlike the 1832-1834 process, the 1891 Constitution left elements of all three branches of government in the states.

Using Most Similar Systems Design

Brazil's federal moment of 1832-1834 and the other case studies in this dissertation serve both as "crucial" examples and as least similar systems. Germany, the Central American Federation, Brazil (1832-1834), and India differ in significant respects with regard to many variables. Each one, moreover, adopted judicial systems that defy the structural factors that would have predicted the opposite judicial arrangement. The Central American Federation and Germany adopted decentralized judicial systems despite their relatively low levels of structural diversity. The Brazilian monarchy and India adopted judicial centralization despite their high levels of structural diversity.

This chapter describes two similar political systems that experienced divergent outcomes in line with the prediction that this dissertation's thesis makes. Brazil from 1832 to 1834 and Brazil from 1889 to 1891 do not display identical levels or types of structural diversity, but, as the same country separated by time, they manifest considerable similarities. Based on its structural characteristics both of Brazil's federal moments should have given rise to decentralized judiciaries. But the "holding together" experience of 1832-1834 resulted in judicial centralization, while the experience of 1889-1891 resulted in judicial decentralization. The creation of the First Republic represents the less interesting case, because both its structural characteristics and its type of federal moment predict the same outcome: judicial decentralization.

Structure of this Chapter

The following case studies compare Brazil's first federal moment (1832-1834) with its second (1889-1891). It analyzes them in a parallel fashion rather than sequentially. Part One describes the judicial systems of the constitutional monarchy and the First Republic. Part Two examines the negotiations that took place immediately prior to and during each federal moment. Part Three defends the claim that the constitutional monarchy became a federal monarchy for the period between 1832 and 1834. The recent work of various historians has put forward evidence for the claim that Brazil experienced federalism during that time. Part Three also argues for the idea that the 1889-1891 federal moment involved "coming together" rather than "holding together." A closer look at that period reveals that Brazil's provinces lacked territorial integrity. No other political transition in Brazil took the form of a "coming together" federal moment. Part Four explains why Brazil's structural characteristics, during the 1832-1834 federal moment, render it a "crucial case." The "holding together" nature of that federal moment prevented the high levels of structural diversity in Brazil from giving it a decentralized judiciary at the time.

PART ONE: THE JUDICIAL INSTITUTIONS OF THE CONSTITUTIONAL MONARCHY AND THE FIRST REPUBLIC

The Judicial Institutions of the Constitutional Monarchy of Brazil (1824-1889)

The Constitution of 1824 centralized the judiciary. The Emperor, with the advice of the Senate, appointed all judges. Judges held their seats for life (Article 153), unless removed by a court decision. The Constitution also protected judges from being moved arbitrarily from one court to another. A new Supreme Tribunal of Justice received appeals from the highest courts in the provinces (Article 163). That Court also decided

jurisdictional disputes between provincial courts. The central government controlled all substantive and procedural legal codes. The only role played by any state or local institutions took place in the jury trials. According to the Constitution, juries were supposed to determine the facts and the courts were supposed to interpret the law. Each province had to have an apex court (Article 158), but those courts truly belonged to the central government.

The Judicial Institutions of Brazil's First Republic (1891-1930)

The 1891 Constitution decentralized all of the "strategic" and "attitudinal" aspects of the judiciary, but it centralized all of the substantive and procedural legal codes. The states now appointed, paid, and removed their own judges.

PART TWO: BRAZIL'S FEDERAL MOMENTS OF 1832-1834 AND 1889-1891

Institutional Evolution from Unitarism to Federalism under the First Republic

It is not difficult to pinpoint exactly when Brazil became a federation formally, when genuine legislative federalism emerged before the end of the monarchy, because it involved an explicit constitutional amendment that gave the provincial assemblies the ability to override the veto of the provincial president with a two-thirds majority. Executive and judicial functions remained centralized until the adoption of the 1891 Constitution, but now with respect to a circumscribed set of policy domains, the provincial assemblies could make decisions unilaterally.

Original Unamended 1824 Constitution was Formally Unitary

At first glance, the 1824 constitution appears both monarchical—if not absolutist—and centralized—if not unitary (Haring 1968, 29), but I did contain the seeds for the decentralization and republicanism that would emerge from it. In line with a

version of the political theory of the French political philosopher Benjamin Constant (Constant 1814; 1988),the charter entrusted the "moderating power" to the Emperor. The Emperor alone decided the leadership of his Council of State, and he could veto any legislation that Congress enacted. He chose each Senator for lifelong seats. Most significantly, the Emperor could dissolve the government and call for new elections at will.

The 1824 Imperial Constitution was legally unitary, notwithstanding some rhetorical flourishes toward federalism that may have acted as concessions to the provinces. The first article of the Imperial Constitution as imposed in 1824 indicates that the Brazilian Empire cannot become part of any larger union or federation, only if to do so would threaten the independence of Brazil:

> Article 1: The Empire of Brazil is the association of all of the Brazilian citizens. They form one free and independent Nation that does not allow any other link to any union or federation that opposes its independence.

It is worth noting that the document speaks of citizens rather than subjects. This language supports the conclusion that the union consists of citizens rather than provinces, but Article 2 recognizes the provinces:

> Article 2: Its territory is divided into provinces, in that form in which they are currently found, which can be subdivided, as the good of the State requires.

Some scholars make much of the fact that Article 2 recognizes the provinces, for it was as provinces that the territories of present day Brazil first left Portugal, then reintegrated as Brazil in 1820 to be part of the now Liberal Portuguese Empire, and finally declared independence from Portugal in 1822 (Torres 1961, 82). The final clause of Article 2 empowers the central government to subdivide the provinces, thereby contradicting the idea that the provincial borders had any permanency. Unlike the Portuguese Empire, the central government under the Constitution of 1824 did not have

the power to agglomerate provinces in order to make larger provinces. But provinces did not have sacrosanct boundaries; the central government could divide them at will.

No. 4 of Article 6, when it speaks of the qualifications for citizenship, explicitly states that Brazil declared its independence as individual provinces. Dom Pedro's declaration, along the bank of the Ipiranga River in the province of São Paulo, may have begun the independence process, but it did not complete it. According to Article 40, senators are to be chosen according to province. Article 44 makes it clear that when a senator died or retired, the new senator had to be associated with the province linked with the now empty seat. According to Article 71, the "Constitution recognizes and guarantees to every citizen the right to intervene in the business of his or her province, and that are immediately related to their particular interests." This senatorial representation did not differ much from the system of "virtual representation" defended by Grenville and Whately against the cries of the British American colonists in 1775 for "no taxation without representation" (Greene 2010; Whately et al. 1865).

These Brazilian senators did not have to have a residence or any historical connection to the province that they represented. A senator need not have set foot in the province whose interests he supposedly espoused in the Capital.

Informal Development of Federalism Under the 1824 Constitution

Yet the informal situation is less clear. The difficulty in determining when informal federalism crystallized revolves around the point at which provincial elites had power independent of the central government as embodied by the centrally appointed provincial executives. Before the Additional Act of 1834 the provincial presidents could block provincial bills, but it is unclear if they did this as often as the central government

may have wanted. As Oliveira Torres explains, the situation requires more careful inspection:

> If, nevertheless, we deepen the analysis of the organization of the provinces with a certain intensity, we will see that these present truly disconcerting ambiguity, because, as observed the Viscount of Ouro Prêto in his report about the organization of the provinces, these were, simultaneously, organs of the Brazilian state and autonomous entities. From the purely legal point of view, we have recognition of its existence by Article 2 of the Constitution, a constitutional element that the Marquês de São Vicente, so orthodox in his unitarism, abhorred considerably, and we cannot ail to recognize that the Addition Act gave to the provinces a juridical situation perfectly characterized. (Torres 1961, 11)

Well before the 1834 *Ato Adicional*, the government reorganized the local judiciary. The more liberal members of the legislature sought to reform the colonial judiciary. Interestingly, rather than devolve control of the judiciary to the provincial level, the 1827 legislation empowered the city and municipal level with elective justices of the peace and elective juries. Why did the liberals choose to decentralize to the municipal level rather than to the provincial level of government? If the juries and justices of the peace disconnected the municipal patronage system from the national patronage system, then their abolishment reconnected them. Even the Additional Act of 1834 allowed the provinces to create only those courts lower than superior and high courts, and to appoint judges below the level of *desembargador*. The central government appointed the *desembargadores*, i.e., the judges of the superior and high courts. In other words, the central government controlled the courts and the judges at both the appellate and apex levels in the provinces. A province could create its own courts and judges, but two levels of federal appeal existed above them in each province. This arrangement bore resemblance to the judicial Canadian system.

The *Ato Adicional* (Additional Act) of 1834 formally amended the constitution in order to—among other things—decentralize legislative powers to the provinces,

effectively creating a monarchical federation. It may have the nomenclature of a mere "act" but it was understood as a constitutional amendment. In fact, according to the 1824 Constitution, the Congress that enacts a constitutional amendment must receive a mandate to do so in an election. In other words, while the National Assembly determined the nature of the amendment in 1831, it could not be adopted until 1834 after a new round of elections. The original proposal, in its first article, stated that Brazil would not be a "federal monarchy" (*monarquia federativa*). The Emperor retained the ability to name and replace at will the *presidentes* (presidents), the chief executives in each of the provinces, but these envoys of the Emperor served short terms and typically acted as mere figure heads, delivering reports (*relatorios*) to the center from their temporary posts in the periphery. Because Dom Pedro had not achieved the majority age at which he would rule, regency ruled in his stead. Whereas the constitution of 1824 stipulated plural regency in the case of a minority monarch, the Additional Act created unitary regency, one person elected by the national legislature.

Brazil's example of "holding together" federalism took place in 1834 in an often-overlooked episode during what is called interchangeably the monarchical or imperial period. Regionally based calls for decentralization and autonomy threatened to altogether disintegrate the country. Only a few years had passed since, in 1831, Dom Pedro I abdicated the Brazilian throne in favor of his son Dom Pedro II, who, only five-years old at the time, would not take the throne fully until July of 1840. The 1824 constitution set the age of royal majority at 21, and the Additional Act had reduced this to 18. The regency should have continued until December of 1843, but the regent changed the age of majority to 14. As a result of Napoleon's invasion of the Iberian peninsula, the regent mother Maria I and the minority Portuguese King Joâo VI moved with the entire royal court to Brazil in 1808, not returning to Portugal until 1821 (Burns 1993, 112, 117).

Dom Pedro I left the Brazilian throne in order to return to Portugal as its King. It was the same Dom Pedro I who had declared Brazil's independence from Portugal in 1822. Pedro I also left for Portugal because his conflicts with the liberals and radicals in Brazil had come to a head. Dom Pedro I who was in fact an enemy of monarchical absolutism, at least in comparison with his father Dom Joâo VI. When in 1828 his daughter and brother betrayed him and revoked the liberal constitution that Dom Pedro I had written for Portugal in 1826, he was outraged. Dom Pedro I had tried to mollify the more radical and liberal members of the government by granting increasingly liberal concessions. Notwithstanding these liberalizing measures, Dom Pedro I became unpopular. Hence, with his mother dead and both his father and stepmother leaving the continent, Dom Pedro II was essentially an orphan in Brazil.

Dating the creation of federalism in monarchical Brazil presents the difficulty of determining exactly when it qualified as a federation, but whether it occurred in 1823, 1824, or 1834, the judiciary did not achieve decentralization until well after, i.e., in 1891 with the Old Republic.

After declaring independence in 1822, the Brazilian Congress issued a provisional law decentralizing some administrative and executive functions to the councils in the provinces (*Conselhos*). Presidents had unilateral administrative and executive power in all those areas of governance except those that explicitly required the approval of their respective Provincial Councils (Article 8). In those governmental areas that required the agreement of a Council, a majority vote decided the issue, but in the case of a tie the President cast the tie-breaking vote (Article 22). *Presidente em Conselho* (President in Council) took place when a decision required the agreement of the President and a majority of the Council. Hence the President could cast the deciding vote when the Council had reached an impasse and veto outright any decision of the Council. The

Councils consisted of six elected councilors, using the same procedure for choosing deputies for the lower house of the national legislature (Article 10). The councilor with the most votes also became the Vice-President of the counsel and would substitute as President in the event of the imperially appointed President (Articles 9, 17). The Council itself could not take any unilateral action, but it could stymie the President in those areas in which its concurrence was required.

Table 7.1 - Powers of the Provincial Councils and Presidents	
1.	Encourage (*fomenta*) agriculture, commerce, industry, arts, health, and the general comfort/well-being/common good (*comodidade*)
2.	Promote the education of the young (*mocidade*)
3.	Watch over (*vigiar*) over the institutions (*establecimentos*) of care, prisons, work houses, and correctional homes
4.	Order (*propôr*) the establishment of municipalities (*Camaras*), and where they should be
5.	Order (*propôr*) new public works, and the connecting of old ones, and a decision-making process for this, taking care particularly in the opening of better roads and the conservation of old ones
6.	Report to the central government the abuses noted in the collection of taxes
7.	Take a census and record statistics of the province
8.	Report to the national legislature infractions against the laws, and extraordinary events that take place in the provinces
9.	Promote the Catholic missions, the Christian instruction of the native population, the colonization (immigration) of foreigners, and the establishment of mining in the provinces that have minerals
10.	Take care in promoting the good treatment of slaves, and create arbitration to facilitate their slow emancipation
11.	Annually examine the revenues and expenditures of the Councils, after their organization by the administrator (*corregedor*) of the respective county (*comarca*), and examine the accounts of the President of the Province
12.	Decide temporarily the conflicts of jurisdiction between public authorities, but if the conflict appears between the President and any other public authority, it will be decided by the Appellate Court of the District

During this period, the Brazilian concept of government made a distinction between administrating, executing, and writing the law. A distinction, between writing the law on the one hand and executing or administering the law on the other, traces back to Montesquieu's conception of a "separation of powers." The 1824 law took the separation a step further. The powers of the President-in-Council were strictly administrative. In other words, even though the President-in-Council might use a written document to instruct others how to spend money on a project such as a road or school, this action was purely administrative. The President himself was responsible for executing actual laws written by the central government, but he did not execute any laws of the province because the province could not enact generally applicable laws. Legislatively generated administrative instructions were not law.

HISTORY LEADING UP TO THE FEDERAL MOMENT OF 1832-1834

Three "Coming Together" Federal Moments that Almost Were

When Brazil underwent a "holding together" federal moment in 1834, it had already experienced "coming together" attempts, even though none of them resulted in federations. Three potential moments of "coming together" federal formation failed to take place between 1820 and 1824, not because they were in fact moments of "holding together" but because they created unitary rather than federal political systems. Not all "coming together" moments create federations. In the first failed federal moment, the Brazil exerienced "coming together" after the 1820 Portuguese revolution. The second "coming together" involved both Brazil and the rest of the Portuguese Empire after that same revolution in 1820. The third "coming together" took place from Brazil's independence from Portugal in 1822 until Dom Pedro's imposition of the his unitary Constitution in 1824.

Brazil's "Coming Together" after the 1820 Portuguese Revolution

In the motherland, a revolt in favor of constitutional monarchy that began in August 1820 had culminated in a provisional junta by the end of that year. This *Junta Provisória* demanded that King João VI return to Portugal and assent to governing at least provisionally according to a Portuguese translation of the reformist Cádiz Spanish Constitution of 1821. This revolution acquired the moniker *vintista* or "of the 20's" in reference to the year 1820. The Portuguese Cortes planned to adopt an indigenous Portuguese constitution along the lines of the Cádiz Constitution later, but it wanted a governing document in the interim. The slow speed of both inter-continental travel and communication limited the rate at which Brazil learned of the revolution and could express its response to the Cortes in Portugal. It was a year between the October 1820 success of the revolt in Portugal and Pernambuco's October 1821 accession as the last of the provinces to join the *vintista* government of the Portuguese Empire.

It is worth noticing that the Brazilian provinces did not accept the 1820 overthrow of the ancient regime and the establishment of the constitutional monarchy in Portugal as one political unit. Acceptance in the face of the news was not instantaneous either, even without the limitations on travel and communication within each province. Grão-Pará was the first to formally accept the new government in Portugal, on January 1, 1821. Bahia was the second to adhere, doing so on February 10, 1821. Next came Dom João and Rio de Janeiro, his provincial residence, February 26, 1821. Pernambuco was the last, October 5, 1821, to pledge allegiance to the Cortes and constitutional monarchy in Portugal. Some of the provinces were unsure whether aligning with the *vintista* government in Portugal was tantamount to treason against Dom João VI. When the Emperor acquiesced to the government in Portugal, most but not all of the Brazilian provinces fell in line quickly. Had the Brazilian captaincies declared independence from

Portugal and sent provincial delegates to a national Brazilian constituent assembly, a moment of federal "coming together" like those of Argentina, Colombia, Venezuela, Central America, and Mexico could have occurred. The Brazilian provinces could have declared independence, from Dom João VI or Portugal, severally or collectively. Alternatively, Brazil could have created its own federation inside a larger Portuguese Empire or federation. Instead, most of the provinces and Dom João VI acceded to the new government in Portugal, a unitary Luso-Brazilian empire. Next the royal central government of Dom João VI defeated whatever remaining resistance existed in provinces such as Pernambuco.

"Coming Together" of Brazil with the Rest of the Portuguese Empire

A different moment of federal "coming together," this one for the entire Luso-Brazilian Empire, could have occurred had the Cortes in Portugal agreed to greater autonomy for the Brazilian provinces and to more equal representation for the colonies in an imperial legislature. Instead, the Brazilian delegates to the Cortes received disrespect from the Portuguese representatives and little hope for more equal representation. This process, from the creation of the Cortes in 1821 until Brazil's declaration of independence in 1822, took more time than did the adherence of the colonies to the constitutional monarchy in Portugal.

Elections to the Cortes were to include a delegate for every 30,000 Brazilians, Portuguese, or persons in another part of the Empire. The Cortes counted inhabitants for the purposes of representation according to a modification of the system of the Cádiz Constitution of 1812. Brazil had the right to 72 of the 181 delegate seats. The Brazil's population in 1808 was 2,323,366. This number of inhabitants should have given Brazil 77 seats, but the algorithm for counting the population according to province resulted in

Brazil having only 72 seats. Portugal had a population of 2,931,393 in 1801. This number would have given Portugal 97 seats, but the count according to provincial divisions within Portugal boosted this number of seats to 100. In other words, counting according to province increased Portugal's representation by three but reduced Brazil's by five. It should be noted that whereas Brazil had 72 seats, no more than 50 delegates arrived in Lisbon, in part because many of them boycotted it in protest of the behavior of the Portuguese management of the Cortes.

Accurate measures of their populations in 1820-1821 do not exist, but the consensus among historians is that Brazil surely had more inhabitants than Portugal. The provisional government in Portugal used outdated censuses for Portugal (1801) and Brazil (1808). Using these two sets of data gave Portugal more inhabitants than Brazil. By 1821, Brazil had at least 4 million people, if not 4.5 million, whereas Portugal had a little over 3 million. Nevertheless, the *Junta Provisória* gave Portugal the right to 100 of the seats. The remainder, 65 seats, belonged to other Portuguese colonies such as Angola and Mozambique. Brazil had 1 delegate for every 53,000 of its inhabitants whereas Portugal had 1 delegate for every 30,000.

Perfect equality in representation in a constituent assembly is not necessary, even when attempting to create a federation. The U.S. Constitutional Convention of 1787 gave each state equal representation, even though Virginia had a much bigger population than Rhode Island. Nevertheless, giving a larger population less raw representation than a smaller population in the assembly seems to have been a symptom of the disrespect directed toward the Brazilians by the Portuguese, if not a cause of Brazilian independence in 1822.

Brazilian Independence in 1822 and the Unitary Constitution of 1824

Another "coming together" federal formation could have occurred when Dom Pedro I declared Brazil's independence from the Luso-Brazilian Empire. Once again, like 1820-1821, a "coming together" took place, but a federal government did not result. As with the process by which the provinces severally adhered to Portugal in 1821, the provinces now severally adhered to Dom Pedro I's independent Brazilian Empire. Somewhat predictably, the provinces adhered to this Brazilian Empire in practically the exact but opposite order in which they adhered to Portugal in 1821. Pernambuco had been last in 1821, but was first in 1822. Grão-Pará was first in 1821 but last in 1822. Pernambuco, and other provinces where native Brazilians dominated, resented subordination to Portugal. The leadership of Grão-Pará disliked Portuguese dominance as well but considered loyalty to Dom João of greater importance. These variations were symptoms of divergences in history, culture, and economy between the provinces.

Most of the provinces of Brazil severally joined Dom Pedro I's new Empire, but the overall outcome was a unitary government. The provinces elected delegates to an 1823 Constituent Assembly to adopt a constitution for Brazil's new constitutional monarchy, but Dom Pedro I grew increasingly frustrated with the assembly and some of its anti-monarchical strains. Ultimately he closed the assembly, called his own advisory committee, and forced a unitary constitution upon the provinces in 1824. Had Dom Pedro I adopted a federal constitution or even forced a federal constitution upon the provinces then it would have been a "coming together" federal moment. Instead, most of the provinces fell in line with this new arrangement, and the government dealt militarily with those that initially refused to accede.

PART FOUR: RETHINKING BRAZIL'S FEDERAL MOMENTS OF 1832-1834 AND 1889-1891

Standard Historiography of Brazil's Early Nineteenth Century: No Federalism Under the Constitutional Monarchy

Admittedly, to most scholars familiar with the historiography of Brazil's nineteenth century, these claims contradict the historical record {Haring:1968uw p. 167, Faoro:2012ud p. 319-388}. Even though they do not use the same terminology, they view 1889-1891 as a process of "holding together" {Freire:1894uu p. 368-369}. Instead of supporting this dissertation's claim that "holding-together" federations tend to adopt centralized judiciaries, 1889-1891 Brazil defies it. The Constitution of 1891 devolved judicial power in the states to the state governments themselves, whereas the judiciary was centralized during the Empire. For most of those same historians, 1832-1834 was not a federal moment at all. Whatever centralization took place was ephemeral if not imaginary {Basile:2009vu}. The conservatives, when they regained power in 1837, undid whatever putative decentralization existed by enacting the 1841 "Law of Interpretation" and reforming the Code of Criminal Process in 1841 {Mattos:1987th}. Even if the Additional Act gave the provincial assemblies some authority legislative, the regime never experienced true federalism because the Act devolved neither executive nor judicial authority. Even the provincial assemblies—legislative authority—did not have any true autonomy from the central government because the centrally appointed provincial presidents had veto power over all provincial bills.

Indeed, most historiography regarding the death of the Empire and the birth of the Old Republic concludes that Brazil achieved genuine federalism only with the establishment of that First Republic. Manuel Correia de Andrade surmises that the "provinces were suffocated by a centralized system until the Proclamation of the

Republic" {Andrade:1997wu p. 15}. Combining this project's "holding together" vs. "coming together" model with that traditional perspective on Brazil's nineteenth century suggests the following causal chain: Brazil experienced its first federal moment in 1889-1891, wherein a "holding together" process produced a decentralized judiciary. Therefore, the Brazilian case violates the claim that "holding together" federal moments create centralized judiciaries. The regnant interpretation of nineteenth-century Brazilian history among historians writing during the twentieth and twenty-first centuries has been that a "holding together" federal moment occurred because the interests of the military, the republicans, and the landed oligarchies aligned for the overthrow of the monarchy {Carvalho:1999vd p. 155, Burns:1993tj p. 232}. This dissertation argues that, contrary to that conventional view, Brazil became federal for the first time in the early nineteenth century rather than in 1889-1891.

Inadequacy of the Historiography of Early Nineteenth Century Brazilian Federalism

The dominant interpretation is based upon at least three unfounded assumptions. First, the constitutional monarchy could not have been federal because only republics can be federations. Second, the Brazilian Empire could not have been genuinely federal because it was insufficiently democratic, at least at the provincial level. Third, in order to be a federation, a political system must have national and peripheral versions of all three modern branches of government, i.e., executive, legislative, and judicial. The following discussion in this chapter responds to these presuppositions in greater detail in roughly three ways. First, the combination of monarchy and federalism seems incoherent because so few federations are also monarchical. Second, sufficiently granular analysis of provincial power during the period 1834-1889 reveals genuine autonomy. Third, while it is beyond dispute that the 1891 Constitution included a decentralized judiciary and that

the monarchy had a centralized judicial branch, the judicial branch is only one among three.

Table 7.2 - Structural Diversity and Judicial Centralization		
	Decentralized Judiciary	**Centralized Judiciary**
High Structural Diversity	1889-1891	1832-1834
Low Structural Diversity	-	-

Conventional Interpretations of the Monarchy

The traditional interpretation of the emergence of Brazilian federalism goes hand in hand with the traditional perspective on the factor that held Brazil together during the monarchy: centralization {Holanda:1985wr, Dias:1986wb, Carvalho:1981vv}. According to this view, political elites of the central government, and not of the provincial governments, maintained Brazil's territorial and institutional unity during the long nineteenth century {Mattos:1987th, Jancso:2000ve}. There was no need for genuine federalism under the monarchy because the central government forced the provinces to remain within the union. The *Ato Adicional* of 1834 may have provided some decentralization, but it was not federalism, and it was only temporary. The *Regresso* of the Conservatives, i.e., the Party of Saquarema, reversed the decentralization of the *Ato Adicional*. By the middle of the nineteenth century, and certainly by 1889, Brazil was a centralized state. Real power in Brazilian politics was held at the center rather than at the periphery. The provinces did not have any truly autonomous power until the dawn of the Old Republic and federalism between 1889 and 1891.

According to this conventional view, only after the military coup of 1889 did the provinces extract autonomy from the center. A unitary monarchical Brazil became a republic, and it federalized in order to hold the provinces together. It conceded greater

legislative, executive, and judicial power to the provinces—now turned states—in order to satisfy the diversity of political and economic interests in the union. The 1891 Republic was the first Brazilian federation in which both the national and state levels had their respective instantiations of all three branches of government. It was not as decentralized as one of its supposed models, the 1787 Constitution of the United States. The governmental functions of writing, executing, and applying law existed at the state level, but their scope was smaller than that of U.S. states. Brazil's major laws originated from the central legislature and preempted any state laws that contradicted them.

The new Brazilian government was not entirely democratic or republican, but it was more republican and democratic than the monarchy had been. The monarch no longer appointed the members of the national senate to lifetime terms. Voting was not secret, creating an opening for corruption and patronage. The electorate did not include all men and women. An oligarchy of the states emerged and retained control until Getúlio Vargas overthrew the regime in 1930. Those who contend that the Empire was absolutist should remember that Brazilian elites played a central role in pushing João VI in 1821 and Pedro I in 1831 to return to Portugal. Moreover during both the regency from 1831 until 1841 and the period until Pedro II involved himself directly in governance, political elites rather than the monarch controlled the public policy of the country.

An Alternative Interpretation

This dissertation adopts unorthodox views of both 1832-1834 and 1889-1891. In the first few decades after independence from Portugal, Brazil had already gone from being a centralized monarchy to a federalized one, even if the judiciary remained as centralized as it had been during colonial times. Therefore, instead of taking place from 1889-1891, Brazil's "holding together" federal moment occurred much earlier in the

nineteenth century (Dolhnikoff 2005, 16). As a revisionist account, this interpretation has plenty of detractors, but the following analyses of the formal structures of the federal monarchy, on the one hand, and its informal functioning, on the other, demonstrate its accuracy. Notwithstanding the reasonable objections to this interpretation of a federal nineteenth century in Brazil (Basile 2009, 114-115), the combination—of detailed analysis and a sufficiently specified model of federalism—reveals a "holding together" moment in 1832-1834. In his critique of Dolhnikoff's argument, Basile uses a "balance" conception of federalism:

The simple constitutional division of competency between center and province, the existence of some degree of provincial autonomy (or of decentralization) and the participation of the provincial elites in the national political game by means of their parliamentary representatives—aspects that define the concept of federalism adopted by the author—are not enough to configure the implementation of a supposed federalist victory in the Empire, because they are elements encountered in almost all national states. Thus, the core of the issue is in the balance existing in the domains of prerogatives, the spaces of autonomy, and the powers of intervention between the governments of the center and provinces, relations of force that, evidently, swing much more to the first side, after the conservative revisions of the reforms (Basile 2009, 115).

For Basile, in order for federalism to exist, the majority of the power—in its various forms—must belong to the provinces. Other theorists of federalism, such as Michael Greve have argued that the "balance" model is incorrect because some functions are inherently national while others inherently provincial, and because the powers are incommensurable (Greve 2012). Most theorists of federalism agree that interstate commerce and national defense should not be part of provincial power in any federation. But Greve contends that K-12 public education and local roads do not belong in the

domain of national powers. He believes that the states should compete for residents and businesses, according to what he calls "competitive federalism," rather than work symbiotically with the national government according to what he calls "cooperative federalism" (Greve:2012ey) . Yes, the national government can subsume all of the powers of the provinces—unitary countries function his way—but in a federation these powers find their most efficient application among the provinces. Basile is also using a conceptualization of federalism that insists upon the peripheralization of all three branches of government, executive, legislative, and judicial.

Of equal importance to demonstrating the reasonableness of these unorthodox interpretations are the words of the historians who have advocated them. For that reason, some relatively lengthy quotations are necessary. The appeal to authority may be the weakest form of argument, but it is still a form and a necessary one in this context.

More recent historical accounts have brought to the fore the reality of at least a modicum of federalism during the monarchy. Miriam Dolhnikoff argues that provincial elites used the central government in order to negotiate an imperial federal pact (Dolhnikoff 2005, 14). Colin MacLachlan characterizes the period as one of "federal monarchy" and "federal oligarchies" (MacLachlan 2003, 12-13). He writes that:

> Regional tendencies dominated crisis politics. While most supported the notion of union, they preferred to allow each province to govern itself with little interference from Rio. The national elite, still in the process of emerging and elaborating a broader outlook, remained weak. (MacLachlan 2003, 12-13)

According to even José Murilo de Carvalho, himself an advocate of the view that centralization and centralized elites maintained Brazil's integrity during the nineteenth century, "in what is referred to as the federation [during the monarchy], it lacked only the election of provincial presidents for the system to approximate the U.S. model" (Carvalho 1999, 165). Ana Freitas examines Minas Gerais between 1870 and 1889, specifically the

relationship between the provincial legislators and the centrally appointed presidents, to demonstrate that the provincial assemblies had real formal and informal power (Freitas 2008).

The Founding of the Old Republic between 1889 and 1891 as a "Coming Together" Federal Moment

The disintegration of Brazil upon the declaration of the Republic was more than a legal fiction. The provincial elites took a wait and see approach to the actions of the provisional government. Granted, there may have been some "putting together," just as there had been in both 1820 and 1822. Alfred Stepan contends:

> Most Brazilian states were not unhappy about the Brazilian Federal Republic being created in 1889. However, Brazil was an independent state and unitary empire from 1822 to 1889, and the military, after the coup overthrowing the emperor, unilaterally announced in their "Proclamation of the Republic" that the federation was formed and that the military would use force to ensure the unity of the federation. When the first federal constitution was constructed in 1891, the state of São Paulo was the hegemonic political and economic force at the Constituent Assembly. (Stepan 1999; 2001; 2004b, 36)

Joseph L. Love, in a chapter on the importance of the Old Republic to Brazilian nation building, seems to misunderstand Stepan's differentiation between "coming together" and "holding together":

> In Alfred Stepan's distinction between two kinds of federal states – those that "came together" and those that "held together," Brazil's first federal regime (1891), although not mentioned by Stepan in his influential 1999 essay, it was one of the earliest examples of the latter kind. The creation of a cohesive Brazilian territorial state was the achievement of the centralized empire, but the country only "held together" after the Republican coup of 1889 by meeting the regional demands of São Paulo and other southern states. Stepan views successful "holding together" regimes as characterized by special concessions to minority populations (e.g., Spain and Belgium), but this model doesn't fit Brazil: the federated units in the 1891 constitution and those of subsequent constitutions had formal equality. This outcome was associated with the fact that Brazil is among the world's largest

> federal states with a broadly homogeneous culture, and it is the largest federation in the developing world with that characteristic.

We know that Love misunderstood Stepan because, when Stepan clarified his concepts and specifically mentioned Brazil's federal moment from 1889 to 1891, Stepan put the Old Republic in the column of "coming together" federations. Stepan observed that Brazil's 1889-1891 experience did not match perfectly match the ideal type of "coming together," but he nonetheless placed it among the set of "coming together" federations. Love's misunderstanding of Stepan is very understandable. Let us take a look again at Stepan's definitions in 1999 and 2004:

> First of all, we need to ask: How are democratic federal systems actually formed? Riker has to engage in some "concept-stretching" to include all the federal systems in the world in one model. For example, he contends that the Soviet Union meets his definition of a federal system that came about as the result of a "federal bargain." Yet it is clearly a distortion of history, language, and theory to call what happened in Georgia, Azerbaijan, and Armenia, for example, a "federal bargain." These three previously independent countries were conquered by the 11th Red Army. In Azerbaijan, the former nationalist prime minister and the former head of the army were executed just one week after accepting the "bargain."
>
> Many democratic federations, however, emerge from a completely different historical and political logic, which I call holding-together federalism. India in late 1948, Belgium in 1969, and Spain in 1975 were all political systems with strong unitary features. Nevertheless, political leaders in these three multicultural polities came to the decision that the best way—indeed, the only way—to hold their countries together in a democracy would be to devolve power constitutionally and turn their threatened polities into federations. The 1950 Indian Constitution, the 1978 Spanish Constitution, and the 1993 Belgian Constitution are all federal.
>
> Let us briefly examine the "holding-together" characteristics of the creation of federalism in India to show how they differ from the "coming-together" characteristics correctly associated with the creation of American-style federalism. When he presented India's draft constitution for the consideration of the members of the constituent assembly, the chairman of the drafting committee, B.R. Ambedkar, said explicitly that it was designed to maintain the unity of India—in short, to hold it together. He argued that the constitution was guided by

> principles and mechanisms that were fundamentally different from those found in the United States, in that the Indian subunits had much less prior sovereignty than did the American states. Since they had less sovereignty, they therefore had much less bargaining power. Ambedkar told the assembly that although India was to be a federation, this federation was created not as the result of an agreement among the states, but by an act of the constituent assembly. As Mohit Bhattacharya, in a careful review of the constituent assembly, points out, by the time Ambedkar had presented the draft in November 1948, both the partition between Pakistan and India and the somewhat reluctant and occasionally even coerced integration of virtually all of the 568 princely states had already occurred. Therefore, bargaining conditions between relatively sovereign units, crucial to Riker's view of how and why enduring federations are created, in essence no longer existed.
>
> Thus one may see the formation of democratic federal systems as fitting into a sort of continuum. On one end, closest to the pure model of a largely voluntary bargain, are the relatively autonomous units that "come together" to pool their sovereignty while retaining their individual identities. The United States, Switzerland, and Australia are examples of such states. At the other end of the democratic continuum, we have India, Belgium, and Spain as examples of "holding-together" federalism. And then there is what I call "putting-together" federalism, a heavily coercive effort by a nondemocratic centralizing power to put together a multinational state, some of the components of which had previously been independent states. The USSR was an example of this type of federalism. Since federal systems have been formed for different reasons and to achieve different goals, it is no surprise that their founders created fundamentally different structures. (Stepan 1999)

Before 2004, when Stepan explicitly characterized the founding of Brazil's First Republic as a moment of "coming together," Marta Arretche, a leading expert on Brazilian federalism, surmised that the First Republic did not belong to the set of "holding together" federations.

Table 7.3 - Distinguishing Ambiguous Cases: Spain (1974-1983) and Brazil (1889-1891)

Event/Country	Spain 1974-1983	Brazil 1889-1891
Interrupted or Discontinuous Transition from Non-Federation to Federation; No Intermediate Government	YES	YES
Successful Military Coup against Unitary Government	NO (attempted but failed in 1981)	YES (1889 by Marechal Deodoro de Fonseca)
New Elections for Constituent Assembly	YES	YES
Relatively Seamless Transition between Old Government and New Government	YES	NO
Senators for Constituent Assembly based regionally	NO (districts do not cross community boundaries, but communities broken into smaller electoral districts)	YES
Election of Deputies Nationally Proportional	YES	NO
National Referendum	YES (1 before and 1 after)	NO
High Degree of Malapportionment for Senators	NO	YES
High Degree of Malapportionment for Deputies	NO	YES
Are any of the Senators Appointed by Someone or Something Other Than a Subnational Government	YES	NO

Nevertheless, it would be a mistake to assume that the lack of resistance to the provisional government meant that 1889-1891 was a "holding together" moment. The absence of visible conflict does not mean the presence of overwhelming coercion against those who would otherwise revolt. Even Stepan puts 1889-1891 Brazil in his "coming together" column even though he also admits that its "putting together" elements distinguish it from the "coming together" ideal. What he does not contend is that 1889-1891 was a "holding together" moment, not even to the smallest degree. Formally, the central government decided the electoral rules for the constituent assembly of 1890-1891, but informally the provinces did not protest against them because they agreed with them. When considering the historical circumstances, one should not confuse the overawing power of the central government with what is actually the absence of disagreement. The provinces had a choice, but they never put it to the test because the new constitution was basically what they had wanted. Moreover, they knew that significant costs would occur to them if they did resist. It was unclear if the new national leadership would satisfy their concerns, but it was certain that the military had threatened the provinces with violence if they left.

Whereas there had been many *inconfidências*, insurrections, and declarations of independence during both relatively ordinary times and other political transitions, these phenomena were nearly absent in the immediate aftermath the Empire's overthrow.

Table 7.4 - Major Revolts in Brazil (1822-1922)

Place	Year	Description
Pará, Maranhão, Ceará, Paraíba,	1824	Provincial revolts in response to dissolution of Dom Pedro I's dissolution of the constituent assembly
Pernambuco, Ceará, Paraíba, Rio Grande do Norte	1824	Confederation of the Equator
Pará	1831	Related to Dom Pedro I's abdication
Ceará	1831-1832	Revolt against provincial government
Rio de Janeiro	1832 (twice)	Revolt against the Regency
Pará	1832	Revolt against provincial government
Minas Gerais	1833	Revolt against provincial government
Pará	1835-1836	"Cabanagem" revolt against provincial government
Rio Grande do Sul, Santa Catarina	1835-1845	"Farroupilha" Revolution, revolt against provincial government
Bahia	1837-1838	Republican revolt known as the "Sabinada"
Maranhão, Piauí, Ceará	1838-1841	"The Balaida" revolt against the provincial government
São Paulo, Minas Gerais	1842	Revolts against central government
Pernambuco	1848-1849	"Praieira" revolt against provincial government
Rio Grande do Sul	1874	Religious "Muckers Revolt"
Rio de Janeiro	1891	President Fonseca's closure of congress
Rio de Janeiro	1891	resignation of President Fonseca
Rio de Janeiro	1892	formal military revolts against vice-president becoming president
Rio Grande do Sul, Santa Catarina, Paraná	1893-1895	Federalist Revolution against central government
Rio de Janeiro	1893-1894	Naval revolt against central government
Bahia	1897	"Canudos" religious revolt
Rio de Janeiro	1904	insurrection by professional military against central government
Rio de Janeiro	1910	Navy insurrection by professional military against central government
Paraná, Santa Catarina	1912-1915	"Contestado" religious border revolt
Ceará	1913-1914	"Cariry" religious revolt against state government
Rio de Janeiro	1922	Military revolt against the central government

Source: (C. A. de S. Andrade 1947)

Major regional revolts occurred within a year of all of Brazil's major political transitions, with the conspicuous exception of 1889-1891. These major political changes include Pedro I's 1822 declaration of independence, Pedro's closing of the 1823 constituent assembly, Pedro I's 1831 abdication, and the 1831-1841 Regency. Not all of these revolts were against the central government or the provincial governments, and several were religious in nature. Nevertheless, any mass revolt is a sign of dissatisfaction with the current state of affairs. In almost all of these cases, the revolutionaries fought against the national military, provincial militias, or the National Guard.

The exceptional absence of regional revolts, during the transition from monarchy to republic between 1889 and 1891, suggests one of two mutually exclusive explanations. On the one hand, the dearth of insurrection means that the provisional national government was so much stronger than the provinces that the provinces did not bother to even attempt an insurrection. Admittedly, and in line with this theory, the provisional government did close the provincial assemblies and appoint new governors for each of the provinces. Dispersing new governors to each of the provinces helped the provisional central government control the periphery.

On the other hand, the provinces did not bother to revolt because they roughly agreed with the provisional government's actions. Revolts in the capital did occur when the President Deodoro de Fonseca closed the national legislature, when he resigned, and when his replacement took office, but all of these insurrections occurred before the adoption of the new Constitution in 1891. It is reasonable to surmise that, if Fonseca had persisted in closing the Congress and imposed his own more centralized constitution, the revolts would have spread from the capital to the provinces. The fact, that each revolt ceased the moment that the crisis ended, indicates that resistance occurred to protest the actions of Fonseca and his allies rather than to reject the nascent federation itself.

Only after the adoption of the constitution did some provincial elites, such as those in Rio Grande do Sul, choose to revolt. There was every expectation that, between the declaration of the Republic and the adoption of the 1891 Constitution, the provinces would have greater autonomy than they once had, and until the final adoption of the charter it did not make sense to declare full independence from the new Republic. The central government did use the military in some of the provinces, and it replaced some governors, but had the elites in a province wanted to declare and achieve independence from Brazil, the military and the governors could not have easily prevented it.

The National Guard was nominally in the hands of the central government, but its officer corps below the highest level and non-commissioned soldiers had their homes, families, farms, and businesses in the province. It is doubtful that they would have been willing to put down a rebellion if one occurred. During the monarchy, the central government's decision to have the centrally appointed provisional president in each province choose the apex officers of the National Guard in that province was not a sign of strength but one of weakness. If a true rebellion erupted in the province, it was unlikely that the officers would have chosen to obey an outsider and use force against fellow members of their province.

The military and the new governors were successful only because the resistance in the provinces was weak. Resistance in the provinces was weak not because the provincial leaders did not have the will or the means to achieve independence. Provincial leadership simply did not want to try for independence from the rest of Brazil until it saw what shape the new government would take. In addition, declaring and fighting independence would be costly in terms of wealth and lives. The provinces also knew the disadvantages involved in forfeiting the economic and defensive advantages of remaining part of Brazil. The provincial elites did not object to the provisional government because their was a

consensus that the Empire had exhausted its usefulness. Between 1889 and 1891 Brazil did not go from being federal to being unitary to being federal again. Instead it went from being federal to being disintegrated to being federal again.

Interestingly, at least one Brazilian scholar contends that the idea that 1889-1891 was a moment of "coming together" is a legal fiction propagated by those concerned with constitutional law (J. C. de O. Torres 1961, 48). He does so in the process of explaining, well before Stepan (Stepan 1999), that "holding together" federations are every bit as much federations as "coming together" federations. Torres uses "federated" (*federativos*) to refer to "coming together" federations and "federal" (*federais*) in reference to "holding together" federations (J. C. de O. Torres 1961, 51). He argues that many Brazilian legal scholars use the fiction of a "coming together" moment for 1889-1891 because their conceptualization of federation does not allow for the "holding together" type, and they want to properly place Brazil in the family of federations.

1889-1891 would have been a "holding together" moment if at least two things took place. First, the existing government would have had to strip the provinces of all of their autonomy, removing not some but all of the federalization of the *Ato Adicional*. Second, that centralized government would have had to federalize the political system once again through something akin to the *Ato Adicional* or different constitutional amendment that went even further in granting autonomy to the provinces. The change to a republic would not have been necessary for a change to federalism.

In his attempt to identify the location of "sovereignty" between the declaration of the Republic in November of 1889 and the adoption of the Constitution in 1891, the legal scholar Felisbello Freire inadvertently reveals how "coming together" was, in fact, not a legal fiction:

> By this decree one sees that the Provisional Government constituted itself as a collaborator of the state organization, tracing general lines that she should respect. Thus, it determined the convocation of the legislative assemblies, making their election date, opening and duration; vesting them with the constituent character; establishing the principle of the division of the legislative branch *that the States wanted them to adopt*; giving the feature of constituent assemblies to ordinary legislatures; prescribing the conditions of eligibility, in accord with the principles of the Federal Constitution, and the electoral process for the suffrage of the Constituent and, finally, investing the [state] governors with the ability to decree and promulgate the [state] Constitutions, in order that they be submitted for approval to the [state] Constituent Assemblies.
>
> Behold the sovereign functions that should be delegated by the people of the States, instead of by the Provisional Government (emphasis my own). (Freire 1894, 368-369)

Freire adopts a notion of sovereignty consistent with that of unitary countries such as that of Great Britain in the nineteenth century—i.e., sovereignty belongs to Parliament, but he is dealing with a federation like the U.S. where sovereignty ultimately resides with the people in their capacities to simultaneously be citizens of both a state and the entire country. Dealing with the metaphysical concept of sovereignty is not amenable to social scientific analysis, but if sovereignty was embodied in any political body in Brazil between 1889 and 1891, it was in the people. Rather than send it to the state legislatures, the drafters of the U.S. Constitution sent it to statewide conventions that existed for the sole purpose of ratifying or rejecting the new governing document. Behind this decision was the understanding that the people, as both members of a new national government and their state governments, would ratify the division, between the national and state levels, of their sovereignty that they were relinquishing to government.

When the members of the 1889 coup d'état declared the Brazilian Republic and claimed to take back the peripheralized powers of the provinces, they were not simply undoing the federalization of the Additional Act. By declaring the Republic, they were undoing the contract between the people and the monarch, between the people and the

central government that represented them. According to even medieval Iberian legal theory espoused by Francisco Súarez among others, not to mention Lockean contract theory, sovereignty ultimately belongs to the people.

The members of the coup d'état wanted to employ the legal fiction that sovereignty remained with the new national government, notwithstanding the destruction of the monarchy and the exile of the monarch, but in reality they had to tread carefully lest they upset the people in the states. If the people in the states were not satisfied with any of the actions that Felisbello recounts, they would have risen up and resisted. There were alternative actions that the Provisional Government could have taken that would have upset the people in the states, but the decisions that it did take largely mollified the elites in the states into a "wait and see" disposition. The Provisional Government could have drawn legislative districts that crossed provincial lines or chosen senators according to some non-territorial or territorial criterion that did not match provincial borders. One need only refer to the 1823 Constitutional project of Antônio Carlos that saw no further discussion for the sole reason that the Emperor closed the assembly and imposed his own constitution:

> We cite three elements that illustrate the difference: Article 1) The Brazilian Empire is one and indivisible and extends from the falls of Oiapoque until 43½ degrees to the south; Article 4) the convenient division of the territory of the Empire into counties (*comarcas*), of these into districts (*distritos*), the districts into precincts (*têrmos*), and in the divisions there will be attention to natural boundaries, and equality of population, whenever possible (Article 209); In each county there will be a president named by the Emperor and by him removable at will, and an elected presidential council, that helps him. (In the following articles he exposits the attributes of the administrators of the inferior divisions.) As one sees, there are no references to the provinces. The same in the election of Senators—in lists of three names submitted by the national house of deputies, without any distribution according to the provinces (Article 103). Only in the first senatorial election (Article 99) does the provincial criterion predominate. And, if in Article 2 the provinces appear, severally distinguished by name, there they are

> more like geographic realities, than like political categories, such that oceanic islands come mentioned equally, and also the Cisplantine State, "linked by federation" to the Empire. (J. C. de O. Torres 1961, 85-86)

The Provisional Government could have decided not to declare the new regime federal and left that decision to the national constituent assembly. Critics will point to the fact that not one of the states adopted its own constitution prior to the ratification of the Federal Constitution. Therefore, the argument goes, the states clearly did not have the right to adopt constitutions. Yet, if the Provisional Government really did have the power to allow the states to adopt their own constitutions, then it did so by declaring the entire system federal and changing the name of the provinces to states.

The elites in the states chose not to adopt constitutions for at least two plausible reasons. First, they were willing to wait and see because the Provisional government had mollified them in the short term. They did not know the exact shape the new national government would take, but they new it would be federal, and they knew that they would have representation in the constituent assembly that would adopt its constitution. The electoral mechanism for delegates and Senators also reassured them. Political leadership in the provinces before the coup d'état of 1889 did not want to separate from Brazil, but rather, they were unhappy with the form of government, in part because it had abolished slavery and mismanaged the economy. Much like the Spanish American provinces were not seeking separation from their Vice-Royalties, Captaincies, and Kingdoms when Napoleon's invasion of Spain and removal of the Spanish King threw them into an unwanted quasi independence from the Empire and those larger administrative units, the provinces were not seeking separation from the larger territorial unit of Brazil.

Second, they were concerned about the ramifications of adopting their own constitutions. They did not want to signal any separatism to the other states or to the central government, less they destroy the prospects for a united federal Brazil. In

addition, they knew that they would likely have to amend any state constitutions to make them conform to the new national constitution. Even in the United States, after 1789, nearly all of the states shoes to adopt new constitutions now that they national government had changed. Unlike the situation in the U.S. in 1789, the Brazilian provinces turned states did not have constitutions because the 1824 Constitution had not allowed for it. Neither did the U.S. states have constitutions before the Declaration of Independence of 1776, but only colonial charters.

The provincial militias in Rio Grande do Sul were ultimately unsuccessful, but the fight that they put up shows just how hard it would have been for the provisional central government to keep a province from leaving. The military had the advantage of being aided by the resources and militias of the neighboring states in its conquest of the Gaucho separatists, but it is far less certain that the central government of the provisional period could have put down the same separatist movement had it started before the adoption of the Constitution in 1891. The provisional government wanted rapidly and democratically to adopt a new republican constitution not only to achieve recognition from other countries and banks but also to stave off separatism among the provinces. Deodoro de Fonseca pushed for his own more centralized draft constitution in 1890 as the framework for the deliberations of the constituent assembly, but the members rejected it, working with their own more decentralized draft and adopting a federal constitution in February of 1891. If in 1889-1890 the provisional government had imposed a constitution instead of calling for a genuine constituent assembly, or if Deodoro de Fonseca's closure of the legislature and declaration of imposing a more centralized constitution had succeeded in November of 1891, it is likely that many states would have attempted and even succeeded at secession.

The decision to combine the two houses of the constituent assembly probably had more to do with the desire for haste than a concern with "one man one vote." Even after the combining the two chambers, the smaller states had the numbers to band together and force their interests. Moreover, the delegates knew that if the "shadow senate" did not get its way then the real senate would return or the constituent assembly would fail entirely.

A cursory glance at the 1889-1891 federating process leads to the inaccurate perception of a "holding together" moment. According to the conceptualization set out in Chapter Three, a federating moment takes place, even in those cases where a federation once existed, so long as the old federation ceases to exist. A federation dies when the country becomes unitary or breaks up into several separate units. When Deodoro da Fonseca overthrew the monarchy and a group of Republicans declared the Republic on November 15, 1889, there was no guarantee that Brazil would remain intact. Deodoro da Fonseca sent military forces into some of the provinces to make them stay with Brazil. Protests occurred in Maranhão and Bahia (Burns 1993, 233). During the interregnum until the adoption of the 1891 Constitution, the provisional government appointed members of the military as the presidents in some but not all provinces. The uneven presence of these militarily appointed governors suggests that in the vacuum left by the proclamation of the Republic, physical force was necessary to keep the now separated states together until a the adoption of a constitution. In 1822, the Emperor Dom Pedro I had simply declared independence from Portugal rather than dissolved Brazil into separate captaincies. In 1889, the central government truly did cease to exist, even though the provisional military government attempted to act as though their takeover had made the end of the Empire and the creation of the new Republic seamless in the eyes of the provincial leadership.

Since Brazil technically came apart after the declaration of the Republic, its federalization in 1889-1891 counts as a moment of "coming together" that adopted a decentralized judiciary. The "coming together" federal moment in which the Brazilian political elites declared a Republic and adopted the 1891 Constitution did indeed structure Brazil as a federation with decentralized executive, legislative, and judicial branches. Minas Gerais experienced a coup attempt in July of 1890 (Wirth 1977, 186). Afro-Brazilians held demonstrations in protest of the new Republic (e.g., São Luís in Maranhão) because they believed it was the monarchy, specifically the Princess Regent Isabel, that had abolished slavery and freed those of them who were still slaves on May 13, 1888 (Freyre 1970; Priore and Venancio 2010). The provisional government declared Brazil a federation on November 16, 1889, by Decree Number 1 (Calogeras 1939, 277).When Floriano Peixoto became President on November 23, 1891 he brought about a number of military interventions (*derrubabas*) in the states in order to remove any governors loyal to Deodoro (Schneider 1991, 74). The elections to the Constituent Assembly took place on September 15, 1890, and it met for the first time on November 15, 1890, the one year anniversary of both the coup and the proclamation of the Republic (Calogeras 1939, 277). The provisional government dissolved the provincial assemblies (Calogeras 1939, 277). Rio Grande do Sul led a "federalist" revolution that lasted from June 1892 until June 24, 1894 (Calogeras 1939, 293-294). In fact, the government did not reach an official accord with the uprising until August 23, 1895 (Calogeras 1939, 298).

Further evidence of 1889-1891 as a "coming together" moment is the way in which the Senatorial representation was chosen. Previously, the emperor selected one name from among three nominated by a provincial assembly. The senator did not even have to be from the province. Moreover the senate seats were somewhat proportionally distributed.

Table 7.5- Population per Senator in 1890		
Province	**Number of Senators**	**Population 1890**
Alagoas	2	
Amazonas	1	
Bahia	7	
Ceará	4	
Distrito Federal	1	
Espíritu Santo	1	
Goiás	1	
Maranhão	3	
Mato Grosso	1	
Minas Gerais	10	
Pará	3	
Paraíba	2	
Paraná	1	
Pernambuco	6	
Piauí	1	
Rio de Janeiro	6	
Rio Grande do Norte	1	
Rio Grande do Sul	3	
Santa Catarina	1	
São Paulo	4	
Sergipe	1	

Now the senators were elected, albeit indirectly by two removes from the electorate. The citizens chose parochial electors who chose provincial electors who chose the senators. Whereas under the 1824 Constitution the numbers of senators for each state depended upon the number of deputies which depended upon the population, the election for the constituent assembly gave each state the same number of senators, three. The total number of senators was 63. This decision was entirely ad hoc, and likely intended to convince each state to stay in the union by giving it an equal number of votes in the senate for the constituent assembly. It is true that the Constituent Assembly's chamber of

deputies was better apportioned than its Senate. The Senate consisted of 63 members. The Federal District now had 3 senators just like all of the states.

The house of deputies had 205 members. Minas had 37. Bahia and São Paulo had 22 each. Rio de Janeiro had 17. The Federal District had 10 deputies. Amazonas, Mato Grosso, and Espíritu Santo each had 2 deputies. In a perfectly apportioned constituent assembly each deputy would represent roughly 70,000, each Senator 228,000, and each representative 69,000. In the Constituent Assembly, Paraíba had one deputy for every 91,446 people while Mato Grosso had one for only every 46,414. As one might reasonably expect, the malapportionment of senators was even worse. A senator from Paraíba represented 152, 411 people but a senator from Mato Grosso represented only 30,932.

When the Constituent Assembly voted to combine their houses into one constitutional legislature the malapportionment changed. For the sake of clarity, the senators and deputies were now "representatives." A representative from Minas Gerais represented 79,602 people, and a representative from Mato Grosso represented only 18,565 people. Measured this way the choice to combine the legislatures increased the differential among the deputies from a factor of 2 to a factor of 4. The Gini coefficients are 0.1129 for Deputies, 0.4955 for Senators, and 0.1901 for representatives. The combination of the two houses moved representation further away from the senate's higher level of malapportionment than away from the house of deputies' lower level of malapportionment. The rate of 0.1901 puts the constituent assembly somewhere between Spain (0.31) and India (0.10)

Table 7.6 - Malapportionment of Representation as Measured in Gini Coefficients According to Stepan-Swenden

Country	Gini Coefficient
Argentina	0.61
United States	0.49
Switzerland	0.46
Canada	0.34
Australia	0.36
Germany	0.32
Spain	0.31
India	0.10
Austria	0.05
Belgium	0.01
Netherlands	0.00

Of the 60 senators who held office in 1889, only two, Saraiva and Cristiano Ottoni, became members of the 1890-1891 Constituent Assembly.

Table 7.7 – Malapportionment of Representation in the 1890-1891 Constituent Assembly

Estado	Deputies	Population	Population /Deputy	Population/ Senator	Population /Representative
Mato Grosso	2	92827	46414	30942	18565
Pará	7	328455	46922	109485	32846
Rio de Janeiro	17	876884	51581	292295	43844
Distrito Federal	10	522651	52265	174217	40204
Rio Grande do Sul	16	897455	56091	299152	47234
Pernambuco	17	1030224	60601	343408	51511
Maranhão	7	430854	61551	143618	43085
Paraná	4	249491	62373	83164	35642
São Paulo	22	1384753	62943	461584	55390
Piauí	4	267609	66902	89203	38230
Rio Grande do Norte	4	268273	67068	89424	38325
Espíritu Santo	2	135997	67999	45332	27199
Brazil	205	14333915	69922	227522	68913
Santa Catarina	4	283769	70942	94590	40538
Amazonas	2	147915	73958	49305	29583
Goiás	3	227572	75857	75857	37929
Sergipe	4	310926	77732	103642	44418
Ceará	10	805687	80569	268562	61976
Alagoas	6	511440	85240	170480	56827
Minas Gerais	37	3184099	86057	1061366	79602
Bahia	22	1919802	87264	639934	76792
Paraíba	5	457232	91446	152411	57154

According to MacLachlan, the Constituent Assembly was considerably malapportioned:

> Adjustments in the number of representatives did not keep pace with economic and demographic change. For example, Minas Gerais had more representation than the much more important São Paulo. At the end of the empire, São Paulo, Pará, and Rio Grande do Sul suffered from a political imbalance that had little connection to their economic contributions. Other provinces defended their positions, making adjustments difficult. Consequently, senators and members of the council of state often came from provinces no longer central. (MacLachlan 2003, 20)

Notwithstanding this increasing maldistribution, the maldistribution of seats in the 1890-1891 constituent assembly was at least as severe, belying the need to over-represent certain states in order to persuade them to stay in the union.

PART FIVE: STRUCTURAL DIVERSITY DURING THE "HOLDING TOGETHER" OF 1832-1834 AND THE "COMING TOGETHER" MOMENT OF 1889-1891

This section catalogs and describes the various ways in which the 1832-1834 "holding together" federal moment was paralleled by high levels of structural diversity.

Institutions with Structural Legacies

Some structural factors of diversity are the result of institutions that no longer exist. The institutions can no longer act as causes directly, but their structural legacies live on within new institutional frameworks.

Portuguese Settlement of Brazil and Regionalism

Settlement patterns in Brazil laid the groundwork for regionalism. Before they were provinces the regions of Brazil were captaincies. During the first three centuries after Cabral claimed Brazil for Portugal, the Portuguese Empire could not afford to defend or develop the Brazilian continent. Instead, the Empire granted "donatários" to allies, who were not necessarily from the aristocracy or wealthy, in exchange for commitments to settle, protect, and develop the land grant. The government granted the first fourteen between 1534 and 1536. As with all land in Portugal, a land grant was not permanent, but in order to entice wealthy Portuguese to become the captains of these settlements the crown made their ownership hereditary. This mechanism of settlement set Brazil apart from the Spanish American colonies. In Spanish America, at first to the conquistadors and later to other settlers, the Crown granted rights. These included rights

to mines and mineral wealth, some of the indigenous labor (*encomienda*), and some of the land (*haciendas* and *estancias*). Still, the Spanish government did not grant lands anywhere near as large as those given to the hereditary captains general in Brazil.

Brazil would later tighten its control over the captaincies, but Spain maintained relatively centralized controls over its various kingdoms in the New World from the beginning. Over time, the failures of some of the donatary captaincies forced the Portuguese government to retake them and govern them directly. The Crown also chose to buy back some hereditary captaincies even though they were not failing. All of these were now called crown captaincies. Nevertheless, because it still needed wealthy Portuguese to develop and increase the population of some areas, the Crown created roughly eight new captaincies during the seventeenth century. Oliveira Lima notes that after the separation of the Spanish and Portuguese crowns in 1640, the Portuguese reversed the centralizing tendencies of Spanish administration:

After the reestablishment of Portuguese authority and the recovery of the whole of her American colonies, the Lisbon government did not continue the centralizing policy pursued by Spain, either through lack of energy, or owing to doubt as to the efficacy of the Spanish system. Each captaincy remained an administrative unit, directly and individually subject to the orders of the metropolis, without any intervention from the royal representative, although his nominal power extended over the whole of the possessions of the New World. Each of these captaincies lived its own life, more or less as independent of its neighbors, very much as did the English colonies of North America (Oliveira Lima 1914, 56).

Not until the centralizing reforms of Pombal in the eighteenth century did Brazil's governance begin to resemble the degree of hierarchical centralization found from the beginning of colonization in Spanish America. Pombal did away with the last of the

hereditary captaincies in 1759. One cause of this decentralization was the legacy of some many territorial units created in for the system of hereditary captaincies. As it converted the hereditary captaincies into crown captaincies, the Crown attempted to consolidate and rationalize administration. Nevertheless, the original captaincies and their boundaries tended to persist. When the Portuguese first redeemed a hereditary captaincy, it placed a captain-general in charge of that lone captaincy rather than join it with another. The Crown also contributed to fragmentation by creating new captaincies within old ones.

The Portuguese government appointed a governor-general over all existing Brazilian colonies. All of the captains-general, royal and hereditary, were to obey this functionary, but the authority of the governor-general gradually diminished as the Portuguese in the last decades of the sixteenth and the first half of the seventeenth centuries penetrated the interior of Brazil and expanded on the northern and southern extremities of the colony far beyond the line of Tordesillas, and as successive changes in the administrative structure of the colony were imposed from Lisbon. (Mauro 1984, 446).

In 1621 the Crown divided all of the captaincies into two groupings, the Estado do Maranhão in the north and the Estado do Brasil in the south (Mauro 1984, 447). Now there were two governor-generals, each reporting directly to Portugal. In order to deal with the tensions between them, the Crown revived the position of viceroy, but according to Mauro this position quickly lost its authority over the internal administration of the captaincies-general (Mauro 1984, 447). The Pombaline reforms surely centralized the governance of Brazil, but the period before those reforms left a decentralizing mark on the administration of the colonies and gave each of the captaincies a history of autonomous rule. Notwithstanding the aggregation of the smaller captaincies into larger captaincies, the unique colonization process left Brazil geographically divided to an extent greater than that of similarly sized Spanish American colonies.

The Arrival of the Royal Family in Brazil

When the Emperor first arrived in Brazil, provincial "and local administration were left in the hands of the crown appointed governors of the captaincies and crown judges" (Bethell 1984 171). Living a distance from the capital of the monarchy did not change the fact that these centrally-appointed envoys were the central government's way to control the provinces. The Emperor and then the Regency could remove them at will.

Parenthetically, the presence of the monarch may have helped Brazil stay in one piece formally, but informally the colony was divided: "But the mere arrival of a monarch with his court could not dispel the problems confronting the colony. Colonial society was still in a state of evolution rather than consolidation. Regional tensions and antagonisms between different groups were as strong as ever. There was chronic maldistribution of wealth, and rates of growth varied enormously from region to region" (Russell-Wood 1975, 33). In 1811, after the Court had settled in Rio de Janeiro, the government decided to transform the captaincies into provinces with some measure of autonomy from the center (Brasil 1890; Fernandes 2014, 17). The central government created a council (juntas) in each province, in addition to the governor. These *juntas* consisted of the civilian governor, the military captain, an appellate judge (*ouvidor*), a trial judge (*juiz de fora*), and elites elected from among those who had served as overseers (*vereadores*) in municipal councils (*câmaras*) in cities and counties within the province (Brasil 1890; Fernandes 2014, 17). The central government chose all of these administrators except those belonging to the last group. Formally, the elected members of the Council could not make decisions independent of the governor, nor could they overrule his decisions. Formally their role was strictly advisory.

After the 1820 Portuguese revolution, the Portuguese Cortes General officially transformed the captaincies into semi-autonomous provinces in 1821, first in Pernambuco

(September) and then in all of the provinces (October). Even at this moment, Brazil was not an example of "coming together" since no Brazilian provisional junta had declared independence from Portugal. Grão-Pará was the last of the provinces to adhere to Brazil, doing so on August 15, 1823, a year after Dom Pedro I declared independence from Portugal.

Ethnicities and National Sentiment

As Ronald M. Schneider notes, there are "several Brazils" (Schneider 1996, 1-34). Regardless, Brazil, principally then, was an "archipelago of cultures," without any ties of any nature linking the provinces to one another (J. C. de O. Torres 1961, 12).

Regionally Concentrated Diversity in Ethnicity and "Race"

Portuguese descendants of the peninsular settlers dominated the population of Brazil from the conquest until the eighteenth century, but by the time of the Empire blacks (*pardos*), mulatos, and the indigenous collectively outnumbered them. Later waves of Italians, Germans, and Japanese had yet to arrive. The indigenous population overall, not just those integrated into western society, only comprised roughly 8% of Brazil's inhabitants. Haring estimates that of the seven to eight million inhabitants of Brazil in 1845, as much as a third were slaves (Haring 1968, 86). Haring also notes:

> The new Empire therefore was really an aggregation of nearly twenty scattered, centrifugal provinces, many of them with a tradition of autonomy or independence, held together by the prestige of the Braganza dynasty. A truly nationalist sentiment had still to be created. The role of Dom Pedro was expected to be that of a reconciler, mediator, between the north and the south, between the Portuguese and the Brazilian, between the olds and the new. Indeed, except for the presence of the Emperor, Brazil might have gone the way of the Spanish empire in America where the territorial and administrative divisions flew apart to form a galaxy of separate independent republics. (Haring 1968, 23)

Capistrano de Abreu goes so far as to describe the various regional populations as "ethnographic" groups:

> Our five ethnographic groups were actively linked by a common language and passively linked by their religion. They were shaped by the environmental circumstances of the five different regions. (Abreu 1997, 202)

Localized Regional Revolts as a Sign of the Fragmentation of Brazil

The localized nature of the *inconfidências* (rebellions and conspiracies against the imperial government) that took place in Minas Gerais (1789), Rio de Janeiro (1794), Bahia (1798), and Pernambuco (1801) suggests that Brazil remained several geographically separated captaincies (Bethell 1984, 179; Burns 1993, 104-111; Schneider 1996, 37). The grievances of each uprisings were geographically unique and localized even if many of these uprisings' proposed solutions bore resemblances. Leslie Bethell agrees, with respect to disturbances in Minas Gerais, that the "*inconfidência mineira* totally failed to inspire similar movements for political separation from Portugal in Sao Paulo or Rio de Janeiro, much less in Bahia or Pernambuco" (Bethell 1984). Revolts even closer in time to 1834—such as Pernambuco (1817-1824), Maranhão (1822-1823), Pará (1822-1823), Banda Oriental (1822-1825), the Cabanagem (1835-1840) (Ricci 2009), Farroupilha (1835-1845) (Pesavento 2009), Praieira (1849-1848), Minas Gerais (1842), Sâo Paulo (1843), and Recife (1845)—indicate that Brazil had still not reached a geographically widespread sense of nationhood (Barman 1988, 7; Schneider 1996, 39-40). Pará and Maranhão went so far as to declare their own country, the Confederation of the Equator, in 1824, but no other provinces joined them (Leite 1989; Mello 2004). Carvalho explains that this uprising was Pernambucan rather than Brazilian:

> Having taken place almost ten years after the transfer of the Portuguese Court, when Brazil was already the seat of the of the monarchy and the United Kingdom of Portugal and the Argives, a revelation of "Brazilness" would have been

> expected. It was not the case. Brazil was not an important reference for the rebels. *Fatherland* and *patriotism* were common words in the vocabulary of those revolting, but it had to do with Pernambucan patriotism and not Brazilian. In the flag, the hymns, and the laws of the new republic of Pernambuco, there was no reference to Brazil. (Carvalho 2003, 502)

Boris Fausto concurs:

> Revolts during the Regency do not fit into a single framework. They were related to the difficulties of daily life and to the state of flux in the organization of the government. But each rebellion was the result of specific conditions in the provinces or in specific localities. (B. Fausto and Fausto 2014)

Burns notes that the Portuguese brought three distinguishable groups of African slaves to Brazil and that these groups had geographical concentrations. The Sudanese groups dominated by the Yoruba and the Dahoman originated from lands that encompass present day Liberia, Nigeria, Ghana, and Dahomey. The Yoruba populations concentrated in Bahia, while the Dahomans dominated both Bahia and Maranhão . Ethnically Guinea-Sudanese Muslims concentrated in Bahia. A third group consisted of the Bantu from Angola, the Congo, and Mozambique. They were concentrated in Rio de Janeiro and Minas Gerais (Burns 1993).

The Portuguese Americas consisted of diverse regions: North (Amazonas, Pará), Southeast (Minas Gerais, Sâo Paulo), South (Rio Grande do Sul, Paraná), Northeast (Ceará, Pernambuco, Bahia), Center-West (Goiás, Matto Grosso). Abreu adds:

> Most of the population was racially mixed. And the mixtures in composition varied according to each locale. In the Amazon region the Indian element prevailed. Mamalucos abounded, mulattoes were rare. In the cattle-raising regions there were few blacks, and many Indians were assimilated. On the coast and in the mining districts blacks were in the ascendance, with all possible derivatives from this base. South of the Tropics the percentage of whites rose. Of the three irreducible races, each one originating on a different continent but forced to live side by side, pure Africans were there in greatest numbers owing to the waves of them brought in every year by slave traders" (Abreu 1997, 182).

Only about 330,000 immigrants came to Brazil between 1830 and 1875, most of which were Portuguese and German, with much smaller groups of Swiss and Chinese among others (Lesser 2013, 33). Fernand Braudel notes that Recife, Salvador, and Rio de Janeiro had their own "colonies" in their respective interiors (Braudel 1979, 426).{Lesser:2013vu p. 33}. Fernand Braudel notes that Recife, Salvador, and Rio de Janeiro had their own "colonies" in their respective interiors {Braudel:1979wp p. 426}.

Some scholars contend that Brazil had a relatively strong sense of national identity by the 1830s, but the historical record does not support this claim. Admittedly, there were sources that could have acted as a catalyst for nationalism. Burns notes that a "common language, a unifying religion, and shared ideological preferences," along with the geographic unity of the country generated by the historical fluke of Brazil's united independence from the mother country, fostered Brazilian nationalism (Burns 1968, 7). Burns goes on:

> Other Latin American historians concur in that opinion. The Mexican Daniel Cosío Villegas believed that Spanish and Portuguese colonial oppression created a 'nationalist sentiment and ardor' foreshadowing Latin American independence [(Cosío Villegas 1962, 681)].Víctor Andrés Belaúnde included Brazil among the Latin American countries that developed a "colonial nationalism" before independence [(Belaúnde 1938, 118-119)]. According to Jorge Basadre, "the '*conciencia de sí*,' the national self-consciousness felt by Americans…first appeared in the late seventeenth century and reached maturity in the early decades of the nineteenth century" [(Basadre 1965). (Burns 1968, 7)] (including authors that Burns cites)

Arrival of the Braganzas to Brazil Exacerbates the Rivalry Between the Northern Regions and the Southern Regions

Bahians and other residents of the northern colonies of Brazil had not forgotten Pombal's decision in 1763 to move the capital and vice-regal seat of Brazil from Salvador to Rio de Janeiro (Alden 1984, 606). Bahia had been the first capital of all of

the Brazilian colonies since 1549 (Carvalho 1999, 157). Dom Joâo VI's decision to keep the capital of Brazil in Rio de Janeiro poured salt on this old wound (Bethell 1984, 170). The slight was felt even more because Dom Joâo VI did not announce that the royal family would settle in Rio de Janeiro until after stopping in Salvador for two months, January 22-March 7, 1808. Until that point the residents of the northern colonies hoped that seeing Salvador with his own eyes would persuade him to return the capital to Salvador, reestablishing the North's pre-1763 domination of Brazil. The unprecedented move of the entire court to its colony made such fantasies seem realistic. If the King was coming to Brazil then anything was possible. That Dom Joâo VI chose Rio de Janeiro without having ever seen it and rejected Salvador after experiencing it for only a brief time was a source of contention between the North and the South for decades afterwards, even if only implicitly or unconsciously. The danger of clinging to the possibly positive impact of the King experiencing Salvador for itself was the negative possibility of having concrete evidence that the King rejected Salvador for itself. Before his visit, ambiguity remained as to his true opinions of the former capital, but after his rejection there could be no refuge from disgrace in such doubts. Dom Joâo rejected Salvador not for where it was but for what is was. Adding insult to injury, not only did Rio de Janeiro remain the capital and Dom Joâo VI reject Salvador, but Rio de Janeiro was elevated to the level of the capital of the worldwide Portuguese Empire (Bethell 1984, 170).

Overall Assessment of the Strength of Nationalism from 1832-1834

There is no way to know just how strong these elements were in generating a sense of nationhood. Perhaps they were strong and countervailing forces were simply collectively stronger. From the vantage point of the present, many of these factors seem unlikely as fomenters of nationalism, but just as recency can cause cognitive bias so too

can antiquity. Without scientific surveys of popular opinion, it is impossible to empirically compare the strength of nationalism at different points in Brazilian history. It is also important to distinguish between nationalism among the elite and nationalism among average Brazilians. Roderick J. Barman draws the conclusion that an institutional and sentimental nationhood was not achieved until 1852 (Barman 1988, 7).

While the Spanish American countries struggled with democracy and the creation of republican institutions, Brazil enjoyed the relative tranquility of being a constitutional monarchy. In Spanish America, *cabildos* turned *juntas*, filled with elites from more than one city, made collective decisions, but Brazil achieved its independence through the decision of one man, the prince regent. There were some mass demonstrations in Rio de Janeiro, and some of Dom Pedro's counselors tried to persuade him in favor of independence, but unlike Spanish America, there was no declaration of independence with the signatures of elites risking their lives and property. It was not so much that the elites in Spanish American colonies such as Venezuela or the Kingdom of Guatemala voted in favor of independence, for this was not necessarily a sign of nationalism. Instead, it was the collectivity, geographic diversity of the signatories within a given kingdom or captaincy, and the debates that suggest at least some nascent nationalism. Brazil's independence had none of these aspects.

The contention that Brazil's knowledge of its distinctiveness fed nationalism mistakes the causes of independence from Portugal for an embryonic nationalism. It is true that the rejection of things Portuguese was at its highest levels in the two decades before and after independence. If self-understanding in the face of "the other" is one of the routes to national sentiment, then the many "others" surrounding Brazil enhanced the sense of national "Brazilianness." Even if the Brazilians of the early nineteenth century did not uniformly or completely know what it meant to be Brazilian, these "others"

provided a foil against which they could unite. Nationalism seems to have peaked for the sake of independence in 1822 and then receded. Once the "other" was removed via secession, nationalism lacked this resource.

Differentiation from Spanish America may have also served as a catalyst for nationalism, but it was thin gruel. More than likely, the reason Brazil stayed in one piece was the presence of the monarch, even when the monarch was a regent. Had the Spanish Court fled to Spanish America rather than stay in Europe, the parts of the Empire in the Western Hemisphere would have maintained their integrity. It is easy today to underestimate the power of the presence of a monarch to maintain unity. The residents of the various provinces of the Kingdom of Brazil were not attached to Brazil as they were attached to the person of the monarch himself, no matter how much elites disagreed with him at times.

Still this sense of nationhood reached only the elite: "Thus for some time Brazilian nationalism failed to focus sharply. National consciousness was limited mainly to scattered intellectuals and politicians. Much of Brazil—particularly those vast areas outside the coastal cities—seemed only vaguely and imperfectly aware of its existence" (Burns 1968, 31). José Murilo de Carvalho goes even further, contending that there was no national sense of Brazil among the average Brazilian at this stage of the country's history (Carvalho 2003). The great historian Capistrano de Abreu agreed that if there was a consciousness of belonging to a piece of territory it was a consciousness of belonging to a captaincy-general (Abreu 1963; Carvalho 2003, 502). When a representative of the province of Sâo Paulo journeyed to the Cortes in Lisbon in 1821, he said that he and the other members of his delegation were not there to represent Brazil, but rather they were there to advance the interests of the province of Sâo Paulo (Carvalho 2003, 503).

Carvalho notes that nearly every province experienced at least one revolt for independence from the Brazilian Empire between 1831 and 1840 (Carvalho 2003, 504).

That a majority of the inhabitants of Portuguese America were black or mulatto did not in any way foster unity. The divisions between the freeborn, freed, and slaves were profound, as were those generated by differing shades of color. Added to these differences were the differences caused by unequal assimilation into Portuguese culture. Among African-born slaves, a profound division separated those long resident and acculturated from those captives newly imported from Africa. Even among the latter no common identity existed, since Africa contained many tongues, religions, and cultures—and slaves were imported from many parts of Africa. Although fluctuating, the volume of the slave trade with Africa in the last quarter of the eighteenth century never dropped below 13,000 a year, sufficient to ensure that the differences—and divisions—persisted. (Barman 1988, 16)

Table 7.8 - Ethnic Composition of Brazil from the Sixteenth to the Nineteenth Centuries

Ethnicity/Period	1538-1600	1601-1700	1701-1800	1801-1850	1851-1890
Africans	20	30	20	12	2
Brazilians of some African Descent	-	20	21	19	13
Mulatos/Mixed Black and White	-	10	19	34	42
White Brazilians	-	5	10	17	24
Europeans and Peninsulars	30	25	22	14	17
Integrated Indigenous	50	10	8	4	2

Source: (Mussa 1991, 163)

Table 7.9 - Racial Composition of Brazilian Jurisdictions by Percentages at the End of the Colonial Period

		Mulattos/Pardos and Blacks		
Place	**Whites**	**Free**	**Slaves**	**Indians**
Pará	57		23	20
Maranhâo	31	17.3	46	5
Piauí	21.8	18.4	36.2	23.6
Goiás	12.5	36.2	46.2	5.2
Mato Grosso	15.8	80.4		3.8
Pernambuco	28.5	42	26.2	3.2
Bahia	19.8	31.6	47	1.5
Rio de Janeiro	33.6	18.4	45.9	2
Minas Gerais	23.6	33.7	40.9	1.8
Sâo Paulo	56	25	16	3
Rio Grande do Sul	40.4	21	5.5	34
Average for Eight Jurisdictions	28.0	27.8	38.1	5.7

Source: (Alden 1984, 607)

Table 7.10 - Racial Composition of Brazil and Brazilian Jurisdiction circa 1834

	Europeans	**Mulattos/Pardos**	**Slave**	**Free**	**Indians**
Brazil (1798)[a]	33.6	-	50.4	7.6	8.4
Brazil (1818a)[b]	30	14	57		<1
Brazil (1818b)[c]	27.3	-	50.7	15.4	6.6
Brazil (1825)[d]	23	28	49		<1
Bahia (1803)[e]	30	30	40		<1
Brazil (1872)[f]	38	42	20		<1

Sources: (Burns 1993, 114)[a](Burns 1993, 47)[b](Burns 1993, 114)[c](Lesser 2013, 22)[d](Burns 1993, 47)[e](Schurz 1961, 105)[f]

Population Sizes and Rates of Growth

Variations in both the sizes of the provincial populations and their rates of growth were sources of centrifugalism. As many historians note, the measures are likely full of inaccuracies, but those failures are doubtfully severe enough to prevent the existing statistics them from serving as evidence of diversity. The differences in many cases are so large that they make invalidation unlikely.

Rates of population growth were at least as important as the momentary sizes of the populations. In fact, the residents of a province probably had a better sense of population growth than population size. They could see the increases by the arrival of immigrants from other provinces and Europe, as well as by the decrease in the distance between themselves and their closest neighbors, but they could not know the population of their village, city, or province in absolute terms. Even if every resident of a province did not know the exact figures, he had a good sense whether the population was growing slowly or quickly. When he doubted his subjective view, he could achieve inter-subjective confirmation by asking fellow residents if they agreed with him.

Of course, the elites had a better sense of both the sizes of their populations and their rates of growth because they had more direct access to the bureaucrats who collected the statistics, they came in contact with a larger number of people (especially elites), and because—as leaders with wealth to lose—they had reason to think of such things. The provincial elites also had a better sense of the relative size and rates of growth of their province's population. They could read, and they were more likely to come in contact with the elites of other provinces through trade.

The differences in rates of growth bifurcated mindsets among the elite. Static population size or slow rates of population growth engendered an expectation of minimal change in the future. Faster rates of growth gave rise to expectations of significant

change. The former tended to think of maintaining what they already had while the latter tended to think of gaining more than they already had.

Table 7.11 – Population of the Brazilian Provinces Before Independence

Captaincy/Province	Population 1776	Percentage of Total Population 1776	Population circa 1800	Percentage of Total circa 1800
Minas Gerais	319,769	20.5	407,004	19.7
Bahia	288,848	18.5	247,000	11.9
Pernambuco	239,713	15.4	391,986	19.0
Rio de Janeiro	215,678	13.8	249,883	12.1
Sâo Paulo	116,975	7.5	158,450	7.5
Pará/Rio Negro	65,701	4.1	80,000	3.8
Ceará	61,408	3.9	125,764	6.1
Goiás	55,514	3.5	52,076	2.5
Paraíba	52,468	3.4	79,424	3.8
Maranhâo	47,410	3.0	78,860	3.8
Piauí	26,410	1.7	51,721	2.5
Rio Grande do Norte	23,812	1.5	49,391	2.4
Mato Grosso	20,966	1.3	27,690	1.3
Rio Grande do Sul	20,309	1.3	38,418	1.8
Santa Catarina	10,000	0.6	23,865	1.2
Totals	**1,555,200**	**100.0**	**2,061,657**	**99.4**
Sources: (Alden 1984, 603; 1984, 607)				

Language

Russell Wood notes that, contrary to conventional wisdom, Brazil's population was linguistically diverse at the time:

> It cannot be overemphasized that internal dissent and division was not limited to the white community. Among coloreds antagonism and tensions existed between freemen and slaves, between mulattos and blacks, and between Brazilian-born blacks and mulattos and African-born slaves who had earned their freedom; cultural and tribal distinctions and language barriers also carried over into the

> New World and effectively destroyed any cohesion among coloreds in Brazil. (Russell-Wood 1975, 24)

Territorial Size

Brazil's size, according to Schneider and Russell Wood, had a dividing effect during the period of the constitutional monarchy:

> Away from the capital, decentralized but politically potent was exercised by the provincial landed class. Given the great distances and poor communications involved, the Brazilian state—even at the apogee of the monarchy—had to recognize the existence of powerful local interests. These could constrain policy choices of the national government, thought not to force it to follow their preferred course of action. (Schneider 1996, 41).

> The very size of Brazil precluded the possibility of any sector, let alone the population as a whole, taking any position as a matter of conscience and enforcing adherence to a single policy or ideology. A heterogeneous population and geographical vastness contributed inevitably to separatism in the political arena, imbalance in economic productivity, and the impossibility of finding a common solution to human problems" (Russell-Wood 1975, 38).

Broken Topography and Transportation

According to Barman, Brazil's fractured topography and inadequate transportation network compounded the effect of the country's enormous size:

> Communication by land was at best slow and difficult, for nature conspired to separate, not link, the constituent parts of Portuguese America. Along much of the eastern Atlantic coast, the Serra do Mar rose almost vertically to two thousand feet or more and so blocked easy access to the interior. In that interior the course of the rivers seemed designed more to hinder than to assist any westward advance. Only in the south, in the captaincy of Sâo Paulo, did the tributaries of the great Paraná River make it comparatively easy for the traveler to move inland by canoe, but even there the journey from the Atlantic to the gold mines of Mato Grosso took some five to seven months of paddling and portage, not to mention the danger of Indian attacks on the west side of the Paraná River" (Barman 1988, 12).

> Despite its considerable risks, travel by sea was perforce the preferred form of communication between the different parts of Portuguese America. Yet even the sea divided and did not unite. The Southern Equatorial Current, which with its

> accompanying winds sweeps westwards along Brazil's northern coast from Cabo Sâo Roque to the mouth of the Amazon, made direct sea communication nearly impossible between the far north and the east coast: it was easier and swifter for the far northern captaincies of Pará and Maranhnão to communicate with Portugal than with the rest of Portuguese America" (Barman 1988, 12).

Shurz observes that "the main feature of the lay of the land is its roughness" (Schurz 1961, 14), with the terrain acting as a "barrier to the attainment of surface transportation system needed to pull together the parts of so gigantic a nation, to facilitate its fuller occupation and development, and to assure the very preservation of its unity" (Schurz 1961, 15). He notes that the only river that truly connects the county is the Sâo Francisco (Schurz 1961, 15-16).

Schurz speculates that if not for the involvement of the United States and Great Britain, other foreign powers probably would have been able to carve it into pieces (Schurz 1961, 27). It was important to these great powers not only that no part of Brazil achieve independence from the whole with foreign help but also that no region achieves independence at all. Smaller and therefore weaker countries were more likely to invite further foreign incursions than a unified Brazil, and the precedent of one successful independence movement could set off a cascade leading to the complete dismemberment of Brazil with or without foreign aid. These diplomatic and military interventions on behalf of Brazil had the added benefit of decreasing the temptation of any local Brazilian leaders from siding with foreign interlopers.

During the colonial period, the Portuguese monarchy "failed to encourage the opening of roads and openly discouraged commerce between the regions" (Russell-Wood 1975, 23). By the 1830s the regions could trade with each other, but the legacy of old patterns did not disappear overnight. Russell-Wood comments that many upper-class Brazilians did not meet their regional counterparts or have any idea of the "vastness and

diversity of their own country" until they travelled to the Coimbra law school in Portugal (Russell-Wood 1975, 23).

Dauril Alden concurs that the Portuguese government did little to foster communication or transportation within provinces let alone between them:

> Conspicuously missing from these efforts to stimulate trade was any step by the crown to facilitate transportation within Brazil, even though a programme of internal improvements might have paid large dividends in expediting the movement of goods from the interior to seaports (Alden 1984, 625) According to the great Brazilian historian Caio Prado Junior "colonial roads were…almost without exception beneath criticism; they were no more passable even by travellers on foot and animals in the dry season, and in the wet season they became muddy quagmires, often defeating all hope of passage" (Alden 1984, 626; Prado Júnior 1967, 298).

> These lines of penetration linking the coast to the interior, all of them detached from each other, led to a fragmentary arrangement of communications in which each axis developed an isolated and self-sufficient system, establishing no interconnections with the other lines of travel. Each system consisted of the two extreme points—coastal centers and interior—linked only along the route established between them an leading a more or less separate existence (Prado Júnior 1967, 277)

Torres points out that the development of links between the different regions near the coast retarded the development of links from the coasts to the interior. He also agrees that the direction of the dominant winds and the currents in the Atlantic Ocean isolated the northern Brazil from southern Brazil. And, if there had been contiguousness of "land" between Rio and São Luís, this was more of an obstacle than a link—in times of primitive land transport, to expect a permanent tie to the interior? And by sea, there was the inflection of the continent, and the unfavorable structure of the winds to make navigation between the North and South almost impossible, as Vieira already recollects. (J. C. de O. Torres 1961, 13)

Economic Integration

A further sign of disconnection between the regions was the fact that the produce of each region rarely travelled north or south to another region for consumption or trade, but rather, these products headed east to the region's major port in order to transport them almost entirely to Portugal:

> The hostile and drought-ridden lands lying between the far north and the eastern seaboard formed a further barrier discouraging land communication between the two regions. Accordingly, almost nothing held together the ranchers on the rolling pasturelands of Rio Grande do Sul in the far south, the miners grubbing for gold and diamonds in the cold streams of Minas Gerais, the black slaves working in the humid cane fields of Pernambuco in the northeast, the mulattoes and mestizos herding cattle through the thornbush and cacti of Piauí in the northern interior, and the Amerindians forced to gather the forest products of the unending Amazon basin. (Barman 1988, 12)

The sliver of products that did not disembark for Portugal went to her African colonies or perhaps a country allied with Portugal:

> Productivity growth was also hindered by the economy's high transportation costs. These limited the access of many agricultural producers to markets in their immediate locale. As a result, the volume of intraregional, inter-regional, and international trade was curtailed. Because of the high ratio of land to labor, cultivation was land-extensive, and distances to the markets large. Low-cost transportation facilities were therefore crucial for developing a high-productivity agriculture. Brazil's geography and topographical conditions, however, made for relatively high transport costs from the production areas to the marker centers. (Leff 1982, 15-16)

Brazil did not build its first railway until 1854 (Leff 1982, 17). In 1864 only 424 kilometers existed (Leff 1982, 17).

> Unlike the United States with its Mississippi and Great Lake systems, Brazil did not have an extensive network of internal waterways that were navigable and interconnecting" (Leff 1982, 16).

Economic Variation

Diversity in provincial geography, soil quality, and climate was matched by diversity in economic outputs (Graham 1990, 12-16). Mining dominated the Southeast (Minas Gerais, Sâo Paulo)(Burns 1993, 66-70), while farming (especially sugar, cotton, and tobacco) and cattle-raising in covered the northern backlands (Ceará, Bahia, and Pernambuco) (Burns 1993, 64-66 70-11). Farming also took place in the Amazon lowlands (Amazonas, Pará), while cattle-raising was prominent in the South (Rio Grande do Sul, Paraná), and trade and fishing drove the economy on the coasts (Rio de Janeiro, Pernambuco) (Burns 1993, 97). At the end of the colonial period (1807) the three largest producers of sugar were Bahia (800,000 arrobas), Pernambuco (560,000 arrobas), and Rio de Janeiro (250,201-360,000 arrobas), a ranking that had persisted since the middle of the eighteenth century (Alden 1984, 630-631). While Maranhão, Pernambuco, and Alagoas also grew tobacco, Bahia's tobacco exports to Portugal and the Mina Coast consistently represented roughly 90% of Brazil's total (Alden 1984, 631-633).

Economic Inequality

Table 7.12 - Taxes Collected by Provinces for Use in Provinces circa 1835		
Political Unit	**Taxes Collected**	**Percentage**
Distrito Federal	78834792	2.72
Alagôas	10488696	0.36
Amazonas[73]	-	-
Bahia[74]	619631720	21.39
Ceará	63839406	2.20
Espíritu Santo	19723617	0.68
Goiás	2503844	0.09
Maranhão75	153721505	5.31
Mato Grosso	320799524	11.07
Minas Gerais	217743997	7.52
Pará76	320799524	11.07
Paraíba	80212829	2.77
Paraná77	-	-
Pernambuco	80227141	2.77
Piauí	64117759	2.21
Rio Grande do Norte	11267524	0.39
Rio Grande do Sul	170682300	5.89
Rio de Janeiro	215180000	7.43
Santa Catarina	29071246	1.00
São Paulo	292701359	10.10
Sergipe	145669218	5.03
Brazil	2897216001	

Russell-Wood notes that there "was chronic maldistribution of wealth, and rates of economic growth varied enormously from region to region" (Russell-Wood 1975, 33-34). Regional tensions were to become increasingly apparent in the years immediately preceding independence. It was no coincidence that it was in the northeast that Dom

[73] Part of Pará (Grão-Pará) until 1889
[74] budgeted amount rather than actually collected
[75] 1836 figure
[76] Grão-Pará 1837 figure
[77] Part of Rio Grande do Sul (Rio Grande do São Pedro do Sul) in 1835

Pedro found it difficult to establish a constituency. This opposition was not directed against the prince personally, nor did it represent disapproval of the perpetuation of a monarchical form of government rather than the establishment of outright republicanism. Rather, it expressed the *nordestinos'* resentment of the attitudes of the court in Rio de Janeiro" (Russell-Wood 1975, 25). The Braganzas had transferred the capital from Salvador to Rio de Janeiro when they fled from Portugal to Brazil. The elites of Bahia had not forgotten this apparent slight, and the elites of Rio de Janeiro had not forgotten the treatment they received at the hands of the elites of Bahia when the capital had been in Salvador.

Conclusion

Brazilian history provides two instances of federalization, a moment of holding together in the early nineteenth century, and a moment of coming together in the late nineteenth century. According to the traditional interpretation the constitutional monarchy never functioned as a federation. This chapter has argued that 1) the Additional Act (*Ato Adicional*) of 1834 was part of a federal moment rather than just a temporary or false decentralization. The standard interpretation of the creation of the First Republic treats it as a moment of "holding together." But the true relationship between the provinces from 1889 until 1891 looks more like a "coming together" moment than a "holding together" federal moment.

This chapter described these two Brazilian cases, 1832-1834 and 1889-1891, to demonstrate how they fulfill the prediction that "holding together" moments lead to centralized judiciaries and "coming together" moments lead to decentralized judiciaries. It attempted to describe the two traditional interpretations in a fair way. It is understandable but incorrect to conclude that Brazil did not federalize in 1832-1834 and

that Brazil experienced a "holding together" moment in 1889-1891. The chapter described how three opportunities of "coming together" federal moments failed because they resulted in unitary political systems.

This chapter also highlighted the many structural factors that predisposed the political system toward decentralization in both 1834 and 1889-1891. These structural factors make 1832-1834 Brazil a "hard case." A version of the "crucial case method," the hard or "least likely case" method enhances our understanding of the causal strength of our most important variable (Gerring 2007). Economic, demographic, and geographic diversity predicted judicial decentralization. The federal moment of 1889-1891 is not a "hard case," but comparing it with the federal moment of 1834 helps us identify alternative causal factors. The comparison between Brazil from 1832-1834 and 1889-1891 employed what J.S. Mill called the method of difference. Structural diversity was high in both cases, but one involved "holding together" and the other involved "coming together." While it is true that some structural factors predicted greater decentralization in 1889-1891 than in 1834, other structural factors such as better transportation and communication forecasted increased judicial centralization. By comparing them, this chapter demonstrates that the slight increase in structural diversity cannot account for the emergence of judicial decentralization in 1889-1891.

Exceptio probat regulam in casibus non exceptis.

—Cicero

Now this is not the end. It is not even the beginning of the end. But it is, perhaps, the end of the beginning.

—Winston Churchill

Chapter Eight

Conclusion

INTRODUCTION

This final chapter accomplishes three tasks that collectively serve as the conclusion for the dissertation. It first briefly rehearses the reasoning and evidence contained in the preceding chapters that explained the inconsistency in the presence of judicial federalism among federal political systems. The chapter then examines federal moments that appear to undermine the dissertation's central theory: i.e., that *ex ante* institutions inherent to a type of federalization predict the *ex post* judicial arrangement in the resulting federation. At least on the surface, those federal moments deviate from that hypothesis in one of two ways: 1) a "coming together" federal moment creates a centralized judiciary, or 2) a "holding together" federal moment engenders a decentralized judiciary. Disentangling and examining the characteristics of those anomalous federal moments transforms them into further support for the "institutional" explanation.

The conclusion's third objective consists in describing some potential ways to investigate judicial phenomena related to the varieties of judicial federalism. Various empirical puzzles emerge from both the theory and evidence contained in this dissertation. Answering those research questions of course presupposes that the federation under examination incorporates judicial federalism. The previous chapters accounted for the existence of judicial federalism within the context of the formations of federations. They treated judicial federalism as a dependent variable. But any further study of judicial federalism would posit the institution of judicial federalism as an independent variable that shapes judicial politics. Such research, in other words, would situate judicial federalism as the cause rather than the effect of some other political

phenomenon. Those investigations could take the approach not only of single-country case studies but also cross-national comparisons.

THE NATURE OF A FEDERATION'S CREATION AND THE SHAPING OF ITS JUDICIARY

Certain institutions that preexist the formation of a federation determine the nature of that federation's judicial institutions. Nearly all federations possess subnational legislatures and executives, but far fewer incorporate subnational judiciaries. Federations form by following one of two stylized paths. "Coming together" federations consist in the merger of previously independent political units. Meanwhile, a unitary state that creates subnational governments and devolves both responsibilities and prerogatives to them constitutes a "holding together" federation. The terms "holding together" and "coming together" refer both to those creative processes and to a resulting federation's type. Those labels do more than attach different names to two otherwise indistinguishable groups of federations. A federation bears the marks of the way in which it came into being.

Defining a "Federal Moment"

A "federal moment" of either form comprises the full sequence of events, from start to finish, inhering in the birth of that federation. Launching a federation includes not only the time period from convening a constituent assembly to promulgating a new constitution. A complete federal moment can extend further than that, both forward and backward in time. It also includes the periods during which the participants deal with the implications of institutions that preexist the process, choose a mechanism for selecting the delegates, and decide the proportion of representation to population. Going forward in time, a federal moment could also include a plebiscite (e.g., South Africa), approval by

the metropole of the colony (e.g., Canada), or actualizing the federal elements of the new constitution (e.g., Spain).

Shaping a Federation's Centralization

The pattern of a federation's birth influences the choices that its founders make for the nature of the federation's institutions. At the most superficial level of observation, federations emerging from moments of "holding together" exhibit higher levels of executive, legislative, and judicial centralization. Subnational governments, for instance, might control fewer domains of public policy, sources for taxation, or lack the ability to borrow. The national constitutions of "holding together" federations grant subnational executives less decree power, control over administrative agencies, and discretion in the selection of appointees. Subnational judiciaries might lack the power to review administrative behavior in the light of enabling law, ordinary law in the face of contravening ordinary law, or statute with respect to constitution. Of course, in all of these cases the national government may or may not possess these powers at the same time that the subnational governments do not.

A Federal Moment's Constituent Assembly and the Balance of Power within It

During the negotiations that shape a federation's institutions, the nature of the federal moment profoundly affects that federation's "centripetousness." Moments of "holding together" favor centralization. They induce a stronger desire for centralization among those already disposed toward centralism, increase the number of centralizers, and give the centralizers more power in the negotiations. Centralizers in a moment of "holding together" have a stronger desire for centralism because they do not even want federalism. Devolutionary federal moments will also have more centralizers because the

slim majority that starts the process has only barely and recently accepted the need for federalism in the first place. Finally, transferring the powers of existing institutions will require the stakeholders in the national institutions to capitulate some of their power.

The relative strength of those favoring centralization and those favoring decentralization determines the ways and degrees of decentralization in the new federation. The presence of more centralizers, a stronger desire for centralization among the centralizers, and a higher number of entrenched interests in national institutions means the balance of power in the constituent assembly will favor centralization. That balance of power exists between the preferences of the stronger group and the deal-breaking point at which the weaker group will forego participation in the federation. For a moment of "coming together" that situation merely means nonparticipation in the federation, but for a moment of "holding together" that situation means secession. The cost of seceding typically dwarfs the cost of remaining a separate country. Decentralizers have more leverage during "coming together" moments than during "holding together" moments. The difference in cost between secession and nonparticipation renders any threat of secession far less credible than threats of nonparticipation.

Devolutionary Federal Moments and the Balance of Power

Additional factors bias integrative federal moments toward the adoption of centralized institutions. Most of the negotiators see themselves first and foremost as national officials rather than as representatives of regional interests, because the system has never before recognized regional interests. In its purest and most simplified form, "holding together" involves the federalization of an entirely unitary state such as Spain, Belgium, or France. Legislators negotiating the extent and shape of devolution in a

federal moment may have won their constituent assembly positions by standing for election in territorial constituencies. Provisional territorial divisions may have both created those geographic constituencies and match exactly the boundaries according to which the constitution regionalizes the country. But those same delegates to the constitutional convention expect to hold office in national political institutions; they have never known anything else.

Political Ambition, Incentives, and the Balance of Power

Participants in a "holding together" constituent assembly rarely take positions in subnational governments for at least two reasons: the power of the office and the difficult in obtaining it. Some national legislators may consider becoming governors, chief ministers, or some other type of chief executive in subnational government; a subnational chief executive wields more power than any single representative in the national legislature. Only if they serve as prime minister, cabinet minister, or committee chair do national legislators have more influence than the chief executive of a state. Even serving—as premier, cabinet minister, or committee chair in the subnational legislature or as cabinet secretary, attorney general, or chief of staff to the subnational chief executive—may not entice national legislators to join subnational governments.

The greater difficulty in winning a national rather than subnational election also shapes the ambitions of office seekers. The national legislator faces less competition to become a subnational chief executive than to win the office of prime minister, president, or other type of national executive. Even though only one person at a time can occupy a subnational executive position, the federation offers more of those positions. But serving as a subnational legislator, on the other hand, constitutes a step down for a national

legislator. The higher improbability of winning a statewide election often dissuades a national legislator from entering an election to become a subnational chief executive, even though holding that office would mean wielding greater political power.

Preexisting National Institutions, Inertia, and Stakeholders

In addition to fomenting a desire among the negotiators for more centralization, a "holding together" moment provides the centralizers with more leverage by implicating not only national institutions but also people who have a stake in them. The unitary state constitutes the status quo, and the decentralizers only have persuasion, log rolling, and the expenditure of political capital to overcome the inertia of existing institutions. Their arguments fall on deaf ears, offers to exchange provisions in the draft constitution go unacknowledged, and efforts to trade on previous political accomplishments fail. The decentralizers have to make credible threats to secede in order to place any weight on their side of the balance.

Creating something new always poses more challenges than maintaining the status quo. New regionalized legislatures and executives will need facilities, staff, salaries, and the basic instruments necessary to enacting and enforcing laws. Those subnational governments will have the ability to raise revenues through local taxation, but the collection of taxes implies the enactment and enforcement of local tax laws. Those who intend to be part of the central government recognize that the regionalization of the legislative and executive functions of government will likely require transferring the tax revenues of the central government to the peripheral governments. It may also involve direct transfers of federal tax revenues to the states. The centralizers do not want to transfer funds from the center to the periphery. On the other hand, the centralizers

know that allowing the local governments to collect their own taxes directly will at least indirectly compete with their ability to collect funds for the central government. As state taxes increase, taxpayers grow less tolerant of higher national taxes.

The Particularity of the Judicial Branch

Variation in the centralization of the judicial branch corresponds, even more closely than the legislative and executive branches do, to the type of federal moment. "Holding together" moments adopt centralized judiciaries while "coming together" moments incorporate decentralized judiciaries. What is more, the centralization of the judicial branch varies more starkly than that of the legislative and executive branches. Almost all federations have both legislative and executive branches that vary only in the range of their prerogatives, powers, and autonomy from the center. The centripetalness of the judicial branch, by contrast, varies dichotomously more often than does that of the executive and legislative branches.

A federation either has subnational judiciaries or it does not. With respect to "holding together" federations, it would seem that decentralizers have a greater willingness to sacrifice decentralization in the judiciary than they do to forego decentralization in the executive and legislative functions. It also appears that their counterparts in favor of centralization care more about centralization in the judicial branch than in the legislative and executive branches. A look at "coming together" federal moments suggests that decentralizers care just as much about retaining the judicial powers of the subnational governments as they do about legislative and executive prerogatives. In a "coming together" moment, the separated political units must agree to centralize some legislative, executive, and judicial power or the resulting political system

will remain a mere confederation or treaty organization. But if "holding together" federations can function without subnational judiciaries, the presence of subnational judiciaries in "coming together" federations constitutes a choice rather than a necessity.

"Coming Together" Federal Moments and Subnational Judiciaries

The preexisting judicial institutions, of the political units that join together into a federation during a moment of "coming together," affect the balance of power in the constituent assembly in much the same way as their preexisting legislative and executive branches do. The multiplicity of judicial systems makes for more decentralizers in the constituent assembly. Familiarity with their own judicial systems intensifies the decentralizers' desire to retain their respective judicial systems by converting them into the subnational judiciaries of the new federation. Vested interests in the judicial status quo on the part of lawyers, judges, and the business community stand in the way of the centralizers' desire to centralize the judiciary entirely. Finally, the subnational governments do not want an entirely national judiciary because it would enhance the national government's ability to monitor the subnational states or interfere with their governance.

"Holding Together" Federal Moments and Subnational Judiciaries

The opposite set of circumstances causes "holding together" moments to give rise to federations with centralized judiciaries. Unity of the judicial system makes for more centralizers in the constituent assembly. Familiarity with that unitary judicial system intensifies the centralizers' desire to keep it unitary. The vested interests of lawyers, judges, and the business community in the judicial status quo stand in the way of the decentralizers' desire to decentralize the judiciary. The national government wants the

ability to monitor, intervene in, or even interfere with the subnational governments. It uses the unity of the national judiciary to deal with authoritarianism, make policy uniform across the entire country, and prevent encroachments on national prerogatives. The judiciary as an institution has inertia. Action always proves more difficult than inaction. The centralizers, for instance, can point to the additional tax collection, whether by the center or by the periphery, that the creation of regional judiciaries will entail.

The Empirical Evidence: Qualitative and Quantitative

These various scenarios play out in both the larger dataset and the case studies of India (1946-1950), Germany (1868-1871), Brazil (1834; 1891), and the Central American Federation (1824). The coding of over sixty cases of "coming together" and "holding together" federal moments reveals few exceptions to the general theory. By additionally characterizing the conforming cases according to their measure of structural diversity (language, culture, topography, and economic inequality), the analysis demonstrates the unimportance of those factors. Type of federalization seems to overwhelm the influence of structural factors. The evidence also suggests that the type of federal moment does not merely proxy structural factors; variation in the type of federal moment does not correlate to any structural factors. The structural factors do not correlate with the centripetousness of judicial institutions. The version of a federal moment does not function as merely the most proximate cause in a chain of conditions leading back to the true cause, i.e., one or more underlying structural characteristics.

The "coming together" nature of the federal moments of Germany (1868-1871), the Central American Federation (1824), and Brazil (1891) engendered federations with subnational judiciaries in addition to their national judiciaries. The federalizations of

India (1946-1950) and Brazil (1834), because they involved "holding together," gave rise to federations with unitary judiciaries. The contrast between Brazil (1834) and Brazil (1891), moreover, demonstrates the pivotal roles of two preexisting institutions: political boundaries and judicial arrangements. If anything, Brazil's structural diversity had increased between 1834 and 1891. Yet its "holding together" moment in 1834 created a unitary judiciary, while its "coming together" moment in 1891 gave rise to a plural judiciary.

Further Tentative Insights

The strength of the evidence, for the argument that the type of federalization predicts the arrangement of the judiciary in federations, suggests some interesting inferences. First, the dichotomous nature of judicial institutions in federations makes it a stronger indicator of relative centralization in federations. Second, it implies that judicial institutions play a unique role in political systems, different from those roles played by legislative and executive institutions. The founders of federations seem to recognize that the judiciary serves a different and sometimes more important purpose in federations than in unitary political systems. Courts adjudicate the boundary between national and subnational prerogatives, and they can do this more effectively when centralized. In federations with plural judiciaries, the political system hangs together more loosely.

Third, the evidence hints that the delegates to constituent assemblies espouse their motivations duplicitously. On the one hand, they espouse a belief in the non-political, fiduciary, and bureaucratic nature of the judicial branch. In "coming together" moments the decentralizers argue against centralizing the judiciary by ostensibly claiming that the non-political nature of the judiciary makes it unnecessary to centralize it. Meanwhile, the

centralizers use the same characterization of the judicial role to argue for centralizing it. The same scenario plays out with respect to "holding together" federations. The centralizers argue against decentralizing the judiciary by ostensibly claiming that the non-political nature of the judiciary makes it unnecessary to decentralize it. Meanwhile, the decentralizers use the same characterization of the judicial role to argue for decentralizing it. Each side in each type of federal moment recognizes the commonly held view that putatively the judiciary alone plays a nonpolitical role, but their behavior during the creation of a federation betrays their belief in the political nature of courts, judges, and judicial systems

LIMITING THE SCOPE OF CASES VS. IDENTIFYING ALTERNATIVE CAUSES

Statistical Noise

No causal argument in the study of politics perfectly explains the entire set of cases under observation. Every analysis of political phenomena must choose between limiting the scope of observations and making an attempt to find alternative causal configurations of independent variables. If only almost all observations conform to an explanation, the presence of those exceptions requires selecting one of many alternative responses. An investigation can justifiably attribute the deviation to the analytical noise inherent to the study of social phenomena, frequently attributed, for example, to the unpredictability of human agency. But that justifiability depends on the ratio between aberrant and conforming observations. Quantitative analyses more so than qualitative studies, can tolerate a higher gross number of irregular observations because they incorporate a large set of observations.

Reducing the Scope of Observations vs. Controlling for Other Potential Causes

A second approach simply limits the scope of the research by finding some characteristic present or absent in the conforming observations but respectively absent or present in the aberrant cases. The flip side of limiting the scope of a study's cases consists in the introduction of control variables. A research design's exclusion of all observations that occurred after a certain date accomplishes the same thing as controlling for whether an observation happened before or after that date. In the first situation, the decision requires some justification, whereas the second one does not. The first approach excludes those observations, while the second one includes them and adds the variation in the condition as another potential cause. Controlling for confounding variables constitutes the third alternative response to deviant observations. Both the second and third approaches set aside the relevant condition but do not consider it as a potentially causal variable.

The following examination of the observations that deviate from the central argument employs a fourth alternative approach. It explores whether any of the statistical noise, conditions, or controls that would apply to the anomalous federal moments might alternatively serve as another explanatory variable. Oftentimes, the deviant cases involve more than one plausible cause. In those situations, the application of a configurational technique becomes appropriate. Posit a set of conditions. One of those conditions remains unnecessary or insufficient for an outcome unless combined with one or more of the other conditions. Suppose an entirely different set of conditions. None of them match a condition from the first set. A condition from that new becomes a sufficient or necessary cause only when joined to another condition from that new set. Those two completely different paths can lead to the same place.

MOVING UP AND DOWN A LADDER OF CONCEPTUAL ABSTRACTION

In order to find a plausible explanation for the aberrant cases, the analysis must move up from one relatively concrete level of conceptual abstraction to another less concrete one. At the most concrete level, the central argument focuses upon the debates in a constituent assembly. More specifically, the balance of power between centralizers and decentralizers determines the nature of a federation's judicial institutions. When the investigation moves up one level of conceptual abstraction, it examines the influence of preexisting judicial and boundary institutions.

We can also look at the argument's levels of causality from the most concrete to the most abstract. The preexisting judicial arrangement predicts the judicial architecture of any federation; any piece of the institutional framework before the moment of federating strongly affects each analogous feature of the new federation's institutional scaffolding. Finally, preexisting institutions engender similar structures in a federation because they alter the balance of power in the constituent convention that begot that new federal political system. At the critical juncture when a changing polity chooses its new institutional framework, a balance of power between disagreeing decision-makers shapes that institutional architecture.

Table 8.1 - Levels of Explanatory Abstraction

Most Abstract (Least Concrete)	Preexisting Institutions Shape or Determine Emerging Institutions by Altering the Balance of Power in the Constituent Assembly
Middling Abstraction (Concreteness)	Preexisting Judicial and Boundary Institutions Determine Judicial the Institutions of the Federation by Altering
Least Abstract (Most Concrete)	The Balance of Power in the Constituent Assembly Determines or Shapes Emerging Institutions

But other preexisting institutions can matter too. At the highest level of abstraction, some other particular preexisting institutions overcome the power of the preexisting judicial and boundary institutions. If those particular institutions only exist in the aberrant cases, they constitute a plausible cause. In this way, the elaboration of the argument moves from the most abstract level to the most concrete (Table 8.1). The discussion starts by explaining the concept of the balance of power, the most abstract level of causality for this dissertation's theory.

EXPLAINING THE APPARENT EXCEPTIONS

Even though the distinction between "coming together" federations and "holding together" federations accounts for most of the variation between systems with judicial centralization and systems with judicial decentralization, it does not explain the judicial arrangement of every federation. The exceptions belong to two groups, i.e., "coming together" federations with centralized judiciaries and "holding together" federations with decentralized judiciaries. At first glance, the diversity of these observations precludes systematizing any relationship between their *ex ante* characteristics and their *ex post* judicial arrangements.

Variation in location, political ideology, and time period marks this set of apparent counterexamples. In Asia, Europe, and the Caribbean, multiple "holding together" communist federations adopted decentralized judicial systems. In British North America, a centralized judiciary resulted from the "coming together" of the Maritime provinces with the Province of Canada. When British and French Cameroon combined into a federation in Central Africa, they adopted a centralized judicial branch. But substituting nonspecific preexisting institutions in place of two specific preexisting

institutions, i.e., judicial systems and political boundaries, reveals a way to organize a causal narrative.

These exceptions seem to defy the central theory of this dissertation, but a closer examination suggests three ways that they in fact support the rule rather than violate it. First, part of an explanation emerges from the extent to which these exceptions stray from the ideal types of "coming together" and "holding together." Second, these cases involve particular circumstances that shape the balance of power between centralizers and decentralizers. Third, in the aberrant cases some institution fulfills the role played in the conforming cases by preexisting political boundaries and judicial arrangements.

Communist Federations: Communist Party System as Substitute

As stated earlier, these moments of "holding together" stray from the ideal type by their inclusion of communist ideology, a one-party state, and not just strong authoritarianism but bona fide totalitarianism. None of the other cases exhibit even one of these characteristics. The communist cases, meanwhile, successfully defy the influence of preexisting judicial institutions and political boundaries because communist party infrastructure substitutes for a centralized judiciary. Whenever communist ideology prescribes the decentralization of a judicial system, a stringent hierarchy functions as the polity's nervous system. Several Communist regimes clearly contravene the argument that "holding together" federal moments establish centralized judiciaries: the People's Republic of China (PRC), the Union of Soviet Socialist Republics (USSR), the Russian Soviet Federative Socialist Republic (RSFSR), the Socialist Federal Republic of Yugoslavia (SFRY), the Czechoslovak Socialist Republic (CSSR), and even Castroite

Cuba. In fact, every communist "holding together" moment establishes a decentralized judicial system.

Even though communist statism implies uniformity in party, ideology, and the distribution of material goods, these "holding together" federations adopted decentralized judiciaries. Only communist federations of the "holding together" variety violate this dissertation's theory. In fact, only one communist federation owes its existence to a "coming together" federal moment. That federation, the Transcaucasian Socialist Federative Soviet Republic (ZSFSR), incorporated a decentralized judicial arrangement, thereby conforming to the theory that "coming together" moments spawn federations with decentralized judiciaries. The ZSFSR's congruence with the theory means that all of history's communist federations have adopted decentralized judicial systems.

The evidence does not support attributing the success of these federations' judicial centralization to the communist ideology saturating the entire political system. Communist ideas do suggest why communist federations adopt decentralization overall. But ideology does not explain how, without a centralized judiciary, a totalitarian federation can succeed at "social control" of its large population spread out over its sizeable territory. Most communist writers have espoused the ideal of returning political power to the local proletariat. No longer would the capitalists, bourgeois, and their political co-conspirators enslave the common worker. Ever more localized political institutions would serve as stepping stones to the complete withering away of the state. In a formerly monarchical or oligarchic political system, reformers and revolutionaries have multiple means at their disposal to increase the demos' political role. Those include establishing elections, widening suffrage, and increasing the number of representatives. Communist countries claimed that transferring more control to local governments

constituted another way to both empower "the people" with self-government and increase the regime's measure of democracy.

A majority of the proletariat, albeit a more local majority, can rule there too. Imagine a particular policy area such as transportation infrastructure. A legislature can have only so many representatives before its size renders it too unwieldy. Federations face this difficulty because they tend to have large populations. Suppose that one legislator represents one million constituents in the national legislature, but one lawmaker represents only fifty thousand people in a regional legislature. The same voter has more influence over the regional deputy than over the national representative. The demos will have more control over the creation of transportation infrastructure if that policy domain belongs to the sphere of regional governmental prerogatives.

This democratization of political institutions, while important to the executive and legislative branches, was superlatively transformative to the judicial branch since it had historically been the least democratic. When it was not functioning as a professional but inefficient and depersonalized bureaucracy, it provided sinecures to members of the landed oligarchy. If we take communist ideology's espousal of proletarian equality seriously, federalism and the decentralization of the judiciary no longer look incongruent with the hierarchical practices of a totalitarian state. The communist leaders of these countries either sincerely believed in decentralizing the judicial branch as they had the executive and legislative branches, or they could not find any communist theory to mask their practical motivations for keeping the judiciary centralized.

Some of the objections to this explanation, for a communist "holding together" moment's incorporation of judicial decentralization, merit responses. If the decentralist nature of communist ideology genuinely influences judicial decentralization, it would

seem to follow that variations in geographic size should not justify the institutional choices made by the founders of communist regimes. In other words, communist ideology has not convinced the leaders of every communist regime to transform their political system into a federation. An ideological commitment to returning control of political institutions to the people at the most local level would lead to federalism for even the smallest soviet socialist republics. But countries such as Armenia, Moldova, and Estonia have unitary political systems. Non-communist countries, such as St. Kitts and Nevis, Switzerland, and Micronesia have smaller territories than those communist regimes, but they adopted federalism anyway.

Some large communist countries, moreover, did not exist as federations let alone encompass decentralized judiciaries (e.g., Kazakh S.S.R., Ukrainian S.S.R., Turkmen S.S.R, and Mongolia). The fact that these countries also lacked decentralized legislatures and executives would seem to further weaken the argument from ideology. Communist leaders in these countries chose unitarism, even though communist ideology prescribed decentralized centers of power. They forewent the ideological legitimation that communist proletarian localism provides. The decision by some communist political systems, such as Kazakhstan and Mongolia, to decline altogether the adoption of federal institutions, suggests that ideological commitment does not tell the entire story.

As with communist regimes' practical application of communist ideology in many other areas, inconsistency with respect to federal arrangements mattered less than necessity and expediency. It seems more likely, therefore, that communist leaders created federalism where necessary in light of human, economic, and other types of fragmentation. Those leaders, moreover, used the apparatus of the communist party to bring greater unity than would have otherwise existed within the federation. The formal

part of the political center can direct judicial appointments in the formal part of the political periphery because the communist party controls all of the politicians at both levels. The central communist party maintains a hierarchically superior position in relation to the peripheral communist party. Each politician served as an official of the state and a member of the party. At all levels of government, the hierarchical position of a particular political role in the formal state corresponded to hierarchically equivalent positions in the communist party. The formal politicians of the center could command the formal politicians of the periphery because the communist party of the center commanded the communist party of the periphery.

Moreover, the level of institutional development in these countries was likely a factor in the choice to keep them unitary. Poorer and less institutionalized before they became communist, the Mongolian, Kazakh, and Turkmen S.S.R.s lacked the necessary regionalized institutions of federalism. In the short term it made more sense to continue with centralism than to expend resources in an attempt to create regional institutions without surety of success.

The Confederation of Canada: 1864-1867

Canada violates the stylized version of both types of federal moments by being a hybrid of "coming together" and "holding together." The four Maritime provinces of Newfoundland & Labrador, New Brunswick, Nova Scotia, and Prince Edward Island experienced "coming together" both with respect to each other and the United Province of Canada, the territory that would later split into Ontario (Upper Canada) and Quebec (Lower Canada). Only the United Province of Canada, the existing unitary amalgamation

of Upper and Lower Canada, experienced "holding together." Those regions would separate into Ontario and Quebec as part of the "confederating" process.

While the chapter on methodology discussed the potential for terminological confusion when speaking of "federation" and "confederation," examining the Canadian federal moment makes it useful to reiterate that clarification. Pamphlets, debates, and accounts contemporary to Canada's birth employed the terms "confederation" and "federation" interchangeably to refer to both the Canadian political system and the process of its creation. At that time, James Madison's invention of a distinction between federation and confederation had not penetrated Canadian political thought. Madison argued that the 1787 Constitution exemplified federation while the 1780 Articles of Confederation typified confederation. Using that same Madisonian distinction, Canadians today speak of "federation" rather than "confederation" when referring to the political system itself. But they continue to use "confederation" when speaking of the federating process itself.

The Canadian case supports the hypothesis that diversity in structural characteristics such as demography, geography, and economy cannot alone give rise to a decentralized judiciary; institutional factors prevented Canada's structural diversity from fully expressing itself during the founding. Stark differences in language and culture between Ontario and Quebec did not give rise to judicial federalism. Moreover, even the institutional factor—of having allowing each province an equal vote during the constituent assemblies—was not decisive. Instead, it was inequality in negotiating leverage that lead to a much more centralized system, especially with respect to the judicial system. And that inequality occurred because the effect of the institutions implicated in the "holding together" between Quebec and Ontario outweighed the effect

of the institutions implicated in the Maritime provinces' "coming together" with Quebec, Ontario, and each other.

The structural characteristics of the territories of British North America contained both multiple and strong sources for disunity. Both the Maritime Provinces and the United Province of Canada (the future provinces of Quebec and Ontario) conducted most of their trade with the United States and Great Britain rather than with each other (Martin 1995, 10-11). Hence an integrated market, on which to base an interconnected political system, did not exist. The different provinces, moreover, specialized in different products (Martin 1995, 10-11). Aside from economic factors, fault lines existed between differing ethnic, religious, and linguistic groups. War and protected its cultural, political, and linguistic distinctiveness as its own province among the colonies of British North America. The Quebecois once lived as subjects of the French Empire, spoke French, and adhered to Catholicism. Hailing from Scotland, Ireland, Wales, or England. The British took Quebec from the French during the French and Indian The remaining share of British North America's population consisted almost entirely of people who had always been subjects of the British Empire, spoke English, and practiced Protestantism.

Between 1755 and 1766, Great Britain deported 11,500 francophone from Nova Scotia, New Brunswick, and Prince Edward Island; disappointed at the rate of their assimilation, the Empire expelled these "Acadians" to places as remote as Louisiana. These forced relocations meant that only Quebec retained a substantial French population. Some French Canadians lived in English-speaking Upper Canada, and some British North Americans lived in francophone Lower Canada, but each of those distinct populations predominated only one of the two provinces. In other words, political

boundaries further intensified and territorialized already mutually reinforcing linguistic, religious, and cultural cleavages.

These dissimilarities not only existed; they even gave rise to armed conflict. Differences between the French Canadians and the English may not have singularly ignited the Quebecois insurrections in Lower Canada during 1837, but they played an important role. The severity of those rebellions, in fact, spurred the British Empire in 1840 to amalgamate the separate colonial provinces of Upper and Lower Canada into the unitary colony of the United Province of Canada. But the process of granting the four provinces self-government occurred from 1846 to 1850. In other words, even though Lower Canada existed as its own distinct British colony from 1763 until 1840, it did not achieve responsible government until 1848. And by 1848 it lacked a political identity separate from that of Upper Canada. The Quebecois did not gain self-rule until they had to share it with the Upper Canadians within the unitary government of the United Province of Canada.

At the time of the Charlottetown, Quebec, and London conventions that created the Canadian federation, the colonies that would become the provinces of Canada consisted of two groups. Quebec and Ontario still existed as the integrated United Province of Canada. After the British granted self-rule to the United Province of Canada, the Quebecois and British North Americans participated equally in governing. The other group of future provinces that participated in the conventions included Nova Scotia, New Brunswick, Newfoundland, and Prince Edward Island. They hoped for an "inter-colonial" railroad as part of the agreement (Martin 1995, 24), even if in retrospect the confederation appears unnecessary to the railway (Martin 1995, 6). A deal to finance and underwrite the creation of the railroad had recently deteriorated during 1862 and 1863

(Waite 1962, 50-59). In fact the Charlottetown conference occurred in part because of the failure to come to an agreement on the railway. It was during the Quebec conference that the provinces reached a final deal. As unrealistic as it my seem today, the delegates feared the possibility that the United States would invade, especially because the American Civil War was taking place.

United States and British North America had achieved the Reciprocity Treaty in 1854. This meant that raw materials traded between the United States and British North America were not subject to import duties (Martin 1995, 10). Unfortunately for the British North Americans, Great Britain's sympathy for the Confederacy during the Civil War led to the termination of this treaty in 1866, even though the Civil War was over (Martin 1995, 22). The American purchase of Alaska from Russia also filled the British North Americans with fear of American expansionism.

The Quebecois and the Ontarians wanted most to convert their union into some other type of political system, even if that meant federation. The Quebecois hoped to regain their own separate parliament with legislative and executive powers. The Quebecois judicial system, because of the differences between the common law and civil law traditions, already operated with significant independence from the judicial system in the rest of the Province of United Canada. The autonomy of that Quebecois judicial system owed its existence to the differences between those legal cultures. The Quebecois judicial institutions followed the Napoleonic strain of the civil law tradition.

The delegates to the Quebec convention, therefore, brought fewer concerns regarding judicial centralization than they would have in the absence of the divergence between those legal traditions. Repatriating the selection of their judges was less important to them than regaining their own legislative and executive branches. Both the

Quebec resolutions and the final British North America Act (BNA) notably single out Quebec as the only judicial system to have its judges chosen from within its local legal bar. Under the BNA, the central government could certainly choose Quebecois judges more favorable toward the federal government generally or the current government's particular ideology. But those judges would still come from the Quebecois legal bar. For all of the other provinces, the central government typically chooses higher court judges from a province's particular pool of lawyers and lower court judges. But the central government could appoint someone from anywhere in Canada to fill a judicial vacancy anywhere else except Quebec. The federal government could even appoint a Quebecois judge to a court in one of the English-speaking provinces.

Until the 1846-1850 process of giving responsible government to the provinces, the British government chose all of the judges in all of the provinces. Just as their American cousins to the south did not achieve control over their own judiciaries until 1776, the Canadian provinces did not have control over their own judges But by the time of confederation, creating the new federal government meant extinguishing each province's only recently acquired right to select, pay, and remove its own judges. Just as the German Empire and Italy can be distinguished because while the members of the German Empire had working institutions and the conquered territories of Italy did not, so too can the analysis distinguish between federations with preexisting fully provincial judiciaries (United States of America) and federations without such institutions (Canada).

The Piedmontese may have preferred Italian territories with preexisting institutions and federalism, but it is clear that the founding Canadian centralists such as John A. Macdonald preferred a centralized judiciary to the alternative of transferring control over the judiciary from the British government to the provinces. One gets the

sense that even if the provinces had been choosing their own judges, the Macdonald and the other centralists would have pushed to transfer the prerogative to the central government. Here, again the judicial power proves itself unique. The centralists were happy to have the provinces establish and fund the lowest tier of courts responsible for the administration of justice, but they were not interested in letting the provinces choose the judges or pay the salaries of the next higher tier of judges. It is reasonable for us to suspect that the leaders of the New Brunswick (Tilley) and Nova Scotia (Tupper) delegations had their eyes on becoming part of the national government more than they did on maintaining significant autonomy for their respective provinces. The Quebec Conference conducted the voting such that each province had one vote.

According to historian P.B. Waite, "New Brunswick was pushed into Union, Nova Scotia was dragooned into it, and Newfoundland and Prince Edward Island were subjected to all the pressure that could be brought to bear—short of force—and still refused" (Waite 1962). Waite, using slightly different language, contends that Prince Edward Island was "railroaded" into union (Brown 2012; Waite 2012).

Cameroon Federation

Ostensibly, British Cameroon and French Cameroun experienced a "coming together" federal moment, but the Cameroon Federation incorporated a centralized judicial system. Federalization combined British South/West Cameroon with French East Cameroun. The name South Cameroon shifted to West Cameroon during the creation of the federation. South Cameroon existed as a British colony within the southern part of Nigeria. Its name reflected its relationship to the rest of the Nigerian colony in which it existed. The rest of Nigerian territory faced South Cameroon from the North. After

federalization South Cameroon became West Cameroon as the westernmost part of the Cameroonian Federation. The change reflected the loss of its old relation to Nigeria and the gain of its new position in relation to French Cameroun. French Cameroun continued to face it from the East.

The federation's judiciary exhibited legal, attitudinal, and strategic forms of centralization. The constitution of the Cameroon Federation endowed the federal government with the power to write nearly all of the important legislation that any judge would interpret (Part II, Article 6, clauses a-e, h, i,). These areas included substantive criminal, civil, commercial, and administrative law, as well as all of the procedural law for those substantive areas. The central government chose all of the judges except for those of the customary courts in West/South Cameroon (Part II, Article 6, No. 1, d; N. Rubin 1971, 120). Appeals from the customary courts to the inferior federal courts occurred as a matter of course (N. Rubin 1971, 120).

As a de facto matter, the central government did not immediately centralize either substantive or procedural law (N. Rubin 1971, 138-139), but the central government was *de jure* supreme over the judiciaries of the federal government and the two federated states (N. Rubin 1971, 131-134). By 1967, for instance, the central government had exercised its prerogative to make uniform both criminal law and labor law (N. Rubin 1971, 242, note 65). Admittedly, the cultural and informal differences between the South/West Cameroonian and East Camerounian legal systems made their uniformization operose. The British had established the institutions, culture, and ideas of the common law tradition in South/West Cameroon, and the French had installed the corresponding elements of the civil law tradition, (N. Rubin 1971, 139). Finally, the Constitution entrusted the central government with regulating, administering, and funding the courts,

judges, and legal staff (Part II, Article 6, No. 1, d; Part II, Article 5, No. 14). The Constitution referred to all courts except for the Federal Court of Justice as the courts of the "Federated States" (Part VI, Article 32, No. 2), but their arrangement made them tools of the central government. Like the "provincial courts" of Canada that actually belong to the federal government, the courts of the "Federated States" of West and East Cameroon belonged to the states in name only. The constitution used the term "federal" in an explicit way only in reference to the Federal Court of Justice. But many other explicit provisions in the constitution implicitly made the entire judicial system "federal."

Why did this instance of "coming together" result in such a centralized judicial system? Put in the simplest terms, institutional factors undermined the bargaining power of South/West Cameroon in the negotiations that decided the centralization of the federation. Rather than conduct a plebiscite on the draft constitution before unification, a South/West Cameroon held a binding referendum in 1961 under the auspices of the U.N. to decide between remaining with a newly independent Nigeria and joining French Cameroun (N. Rubin 1971, 108-109). Unfortunately for the leadership of South/West Cameroon, the UN committee regulating the plebiscite would not allow the ballot to include either of the following alternatives: 1) making South/West Cameroon its own independent state or 2) continuing under the trusteeship of Britain or the U.N. (N. Rubin 1971, 105). In an unfortunate twist of fate, the British representative to the Trustee Council at the U.N., Andrew Cohen, mistakenly thought that his government had told him to prevent those alternatives from making it on the ballots. By doing so, the United Kingdom effectively failed its obligations under declarations 1-4 of UN Resolution 1514(xv) of the UN Trusteeship Agreement. To this day, the people of South Cameroon blame Cohen for their predicament.

The outcome of the U.N.'s different treatment of the Northern Cameroons, another British Colony in a situation similar to that of South/West Cameroon, indicates the importance of the U.N.'s fateful decision. In November 1959 a binding referendum offered the people of the Northern Cameroons two options: 1) integrate permanently with Nigeria or 2) continue as a trusteeship and postpone the decision (N. Rubin 1971, 106, 104). Surprisingly to many at the time, the people overwhelmingly voted to remain and postpone. The U.N. never gave South/West Cameroon the chance to vote for that option. It would only have the 1961 referendum.

The outcome in the Northern Cameroons suggests that, given the opportunity, South/West Cameroon would have voted for delay like the Northern Cameroons. Their combined demand for delay and continued trusteeship may have made the U.N. rethink the haste with which it was trying to dispense with both regions. Distaste for Nigeria among the people of South/West Cameroon made it a foregone conclusion that South/West Cameroon would vote to join French Cameroun rather than to join Nigeria. The U.N.'s decision did not have much of a rational basis. No natural boundary split British Northern and Southern Cameroon. In fact, a small strip of Nigerian land split the Northern British Cameroons in two. The U.N. could have conducted three referenda instead of two. In line with Nigeria's North-Muslim/South-Christian divide, North Cameroon had more Muslims while South/West Cameroon had more Christians. But a large piece of the British Northern Cameroons sat contiguous to Christian rather than to Muslim parts of Nigeria.

Once the plebiscite indicated that the people of South/West Cameroon wanted to join French Cameroun rather than stay with Nigeria, the leaders of the government of South/West Cameroon lost a significant amount of leverage. Hence, the order in which

they process took place played a pivotal role. The leadership of French Cameroun knew that the people of South/West Cameroon desired to join them and that the leadership of South/West Cameroon could lose their positions if they hesitated in joining French Cameroun, even if it meant failing to press for greater autonomy for South/West Cameroon within the federation.

Fragmentation and disorganization of another institution, the party system of South/West Cameroon, further weakened its leverage in the negotiations. Rather than spending most their time at the constitutional conference negotiating with the leadership of French Cameroun, they spent nearly all of the time negotiating among themselves (W. R. Johnson 1970). It also did not help that whereas French Cameroun had a clear set of principles and a document on behalf of which to negotiate, South/West Cameroon had no such resources during the discussions. Hence, even if the institutions typical to "coming together" did not give rise to a decentralized judiciary, at a higher level of abstraction, the institutions of the referendum and its timing did endow the Cameroon Federation with a centralized judiciary. At an even higher level of abstraction, those institutions created an inequality in bargaining leverage that led to the centralized judiciary.

THE POTENTIAL FOR FURTHER RESEARCH RELATED TO COMPARATIVE JUDICIAL FEDERALISM

This dissertation provided an explanation for the presence of judicial federalism, but many related questions remain unanswered. Just how much jurisprudential diversity occurs under various arrangements of judicial federalism? How do differences in legal tradition, e.g., civil law vs. common law, affect the outputs of subnational courts? Among systems operating within the same legal tradition, how much do certain institutional facets of subnational judicial systems influence judicial behavior? This final section of

the conclusion briefly suggests how to design research to answer those and other questions.

Demonstrating the importance of judicial federalism depends in large part on identifying variation in judicial outcomes across subnational judicial systems. This dissertation's Introduction mentioned some examples of variation both among subnational judiciaries in the same country and between the entire set of subnational judicial systems in two or more separate countries. This section connects that Introduction to this Conclusion inasmuch that judicial federalism owes its importance to the judicial outcomes that it generates. For a number of reasons, achieving an accurate measurement of diversity in subnational judicial behavior, whether intra-national or cross-national, requires greater precision than simply noting the disparities in substantive jurisprudence or reversal rates between one subnational judiciary and another.

The following sections discuss these hurdles and some possible ways to overcome them. The study of subnational judiciaries, for example, must isolate the effects of structural inputs on judicial outcomes. In particular, the design cannot overlook the importance of legal support structures. We must also decide whether we are going to vary judicial institutions while holding structural inputs constant, or vary structural inputs while holding judicial institutions constant. Do we want to identify how two different configurations of judicial institutions channel the same set of structural inputs into judicial outputs, or do we want to determine how different types of structural inputs differentially influence judicial behavior when flowing through the same set of judicial institutions? Finally, we must decide whether we are investigating judicial phenomenon at the level of subnational judiciaries within the same country or at the level of the entirety of subnational judicial systems in two or more different countries.

Using the Relationship between Subnational Judicial Arrangements and National Courts to Measure Diversity in Judicial Outputs

Using the examples of Brazil and Switzerland, this dissertation's introduction presented a way to measure variation in subnational judicial outputs. We can measure the degree to which a national court reverses or revises the decisions of subnational supreme courts. A study could use qualitative and quantitative data. Unfortunately, in many systems the national apex court does not have the opportunity to review a large number of appeals from apex state courts. The limited number of observations will preclude any statistically significant results. This situation occurs far more often in judicial systems following the common law tradition. In those judiciaries, national high courts typically can limit their cases through docket control or some system of *certiorari*. Qualitative studies may also contain an insufficient number of cases, but a limited workaround exists.

Measuring the Divergence of Judicial Outputs between the Judicial Systems of Two Subnational Governments

In order to measure and explain the jurisprudential diversity among subnational high courts, an investigation would ideally compare all of the state judicial systems over a certain period of time. But even the observation of just three subnational judicial systems might suffice. By selecting two states similarly situated in terms of characteristics such as 1) dominant political parties, 2) income inequality 3) average income, 4) structure of the economy, 5) human development, and 6) rates of appeal, we can control for other plausible causes. The addition of a third state differently conditioned than the other two states with respect to one of those characteristics could help us identify the influence of that condition. Such a study would not tell us how much diversity the

overall system permits, but it would help us identify the effect of certain judicial institutions and the extent to which those non-judicial factors influence judicial behavior.

Diversity in the Range of Permissible Variation among Subnational Judicial Systems

Subnational judiciaries can differ in ways unrelated to their degree of centralization. Not all federations permit the constitutions and judicial institutions of subnational political units to differ from one another. Many federal political systems set limits, of both degree and kind, on the variations among subnational judicial systems. Some political systems even use their national constitutions to specify those limits in detail. Brazil's 1988 Constitution, for instance, prescribes near perfect uniformity in the institutional arrangement of subnational judicial systems. At the other end of the spectrum, a federation's national constitution may imply the subnational governments' complete discretion in choosing their judicial arrangements; it does so by saying nothing about subnational judicial systems. The United States, for example, allows Louisiana's judicial system to function within the civil law tradition while the rest of the states operate within the common law tradition. The U.S. Constitution says very little about the structure of state judiciaries.

A study of the effects of judicial federalism must determine whether, how, and how much a federal political system allows subnational judiciaries to differ from one another. In one system, for example, a figurative straight jacket of limitations makes all subnational judicial systems identical with respect to the legal, strategic, and attitudinal models of judicial behavior. Features, such as mechanisms for judicial appointments, judicial procedures, and internal court rules, do not differ among the judiciaries of its states. This situation helps certain research because it ensures that variations in

subnational judicial institutions do not cause diversity of judicial outputs. The judicial institutions function as identical conduits that uniformly shape judicial inputs into judicial outputs. Where similarity in institutions predominates, a study can more easily isolate the effects of judicial inputs and judicial institutions. Such an investigation could fairly confidently describe the amount of diversity that system permits. Longitudinal study of that same array of subnational judiciaries would permit an even more accurate estimate. Cross-national comparisons might even reveal dissimilarities in the range of jurisprudential diversity permitted by the distinct arrangements of subnational judicial systems belonging to two or more different countries.

Cross-country analysis of variations in subnational judicial outputs faces greater complications if one of the countries allows considerable variation among subnational judicial systems. In the United States, for instance, states choose their judges through roughly three distinct mechanisms: executive nomination combined with legislative confirmation, popular election, and nomination by commission. Such variation in judicial institutions does not limit conclusions about the amount of diversity the overall system permits, but it does place hurdles in the way of determining whether judicial inputs, judicial institutions, or even one among many possible combinations of them causes the variations in judicial outputs. Where dissimilarities in both institutions and judicial inputs exist, the study must separate their effects. The research design will hold judicial inputs constant while conditioning changes in judicial institutions, or it will hold judicial institutions constant while conditioning changes in judicial inputs.

Isolating the Role of Judicial Institutions by Controlling for Judicial Inputs

Measuring diversity in judicial outputs among subnational judiciaries involves the elimination of potential causal factors that may confound observations of the effect of dissimilarities in judicial institutions. While structural variations played no role in determining whether a federal system adopts judicial federalism, they likely will affect judicial outputs among the states. Disparate levels of economic inequality, divergent legal cultures, and other structural differences among subnational political units can influence judicial outcomes. We can apply J.S. Mill's "method of difference" (i.e., "similar systems analysis): a qualitative comparison of institutionally different judicial systems in structurally similar states. That approach could reveal just how much certain changes to judicial institutions diversify judicial outcomes.

This method only seems to merely repurpose the approach that compares the judicial outcomes potentially attributable to the differences between two countries' national judicial institutions. Inasmuch that the two subnational political systems in the same country have fewer and less pronounced dissimilarities between them than do two different countries, comparing them better isolates the true causal variables. In order to evaluate the effect of institutional differences, the design must control for the differences between the typical jurisprudential predilections of each state's complement of judges. In other words, in a comparison of just two states, the two sets of judges must share roughly identical judicial philosophies. Measuring how much jurisprudential diversity the same set of judicial institutions permits, on the other hand, only starts by comparing just two subnational judicial systems. When using that approach, the judicial institutions remain the same, and only the interpretive philosophies of the judges vary.

Measuring the Variation in Judicial Outputs that a Particular System of Judicial Federalism Permits

Juxtaposition, of structurally similar subnational political units employing meaningfully identical judicial institutions, reveals that certain judicial arrangements permit variation in judicial outputs; but it does not reveal whether that particular dissimilarity in the dependent variable represents the maximum, minimum, or average variability among the judicial outputs of those subnational polities. Assessing the overall diversity of a system of subnational courts requires the study of all of those judicial systems. The research, therefore, must include multiple control variables. Some of these factors have effects particular to judicial outcomes. Such an analysis, for example, must consider the strength and number of legal support structures among the subnational political units (Epp 1998). The importance of a legal advocacy organization to judicial outputs in a specific area of the law depends on the legal subjects that organization addresses. Legal support structures for labor and unions matter to labor law, but they matter far less to family law. Some states will have stronger unions than other states, at least in part because of the laws those states have written to regulate unions.

The Importance of the Legal Model of Judicial Behavior Whenever Measuring Variation in Judicial Outputs among Subnational Judicial Systems

Any investigation into judicial federalism's effects on judicial outputs should also take into account the importance of constitution, statute, and precedent. Designing research about judiciaries can never fully rule out the possibility that the "legal model" contains elements of truth (Bailey and Maltzman 2011), notwithstanding the dismissal of its importance by advocates for the strategic and attitudinal models of judicial behavior. In comparison with analyses of national high courts, studies of subnational courts in fact

offer an advantage. Aside from international treaties and coincidental similarities in national law, the study of national courts cannot control for the role of law. Subnational courts within the same system frequently interpret the same law. While such uniformity of legal sources prevents an examination of the role of legal diversity, neither does it assume away the role that law could play.

In the most ideal circumstances, the subnational courts under examination will be interpreting the same written legal language. Countries in the civil law tradition, such as Argentina, Brazil, and Germany, represent ideal cases since their subnational courts interpret national criminal, civil, and commercial codes. But common law jurisdictions also present possibilities. The Uniform Commercial Code in the U.S., for instance, has not unified commercial law among the states to the extent intended for it by Karl Llewellyn, but it has increased its uniformity. Many provisions have even avoided diversification at the hands of state legislatures. Some of those same provisions, moreover, have experienced interpretive diversification only in the written opinions of state courts. Publications such as the UCC Reporter-Digest systematically identify areas about which state courts have issued deviating interpretations.

Similar or even identical language within different state constitutions also presents opportunities for the study of subnational courts. This occurs in part because those provisions tend to be vague. Variations in interpretation almost inevitably result. As differences in even constitutional language become irrelevant because state supreme courts increasingly give them no more than perfunctory analysis, court interpretations supplant constitutional language as the source of variation among state constitutions. Rarely do we find constitutions from two different countries written in the same language, let alone constitutional provisions expressed with the same words. While

identical language found in two different subnational constitutions may not spring from the same motivations or historical background, it comes much closer to expressing the same thing to the denizens of those two states within the same country.

Controlling for the Role Played By Other Pieces of the Justice Complex

Research into subnational courts will, in addition, have to consider the role of other formal institutions in the legal complex, especially when it comes to criminal law. Subnational political units will vary in the strength and approach of their systems of both public defenders and prosecutors. Some states might favor prosecutors over defenders while other states prefer the opposite. One state could spend a large portion of its budget on prosecutors or public defenders while another state devotes few resources to those institutions. In Brazil, for instance, extant studies of the public prosecutor-cum-attorney general have focused on the federal version (McAllister 2005; 2008), but each state also has its own incarnation of this public advocate, and their interactions with subnational judicial systems vary from state to state.

Cross-National Comparisons of Judicial Diversity among Subnational Judiciaries

The Holy Grail of studies of subnational judiciaries would test the extent to which certain institutional arrangements restrict variation in judicial outputs. Because they could not as adequately control for other causal variables, cross-national comparisons of variation in subnational judicial outputs would seem to prove difficult if not impossible. A study could identify similar laws or simply choose the same broad area of law, e.g., civil, criminal, commercial. But significant differences in law would remain. One could compare the amount of diversity permitted by Germany and Brazil with respect to a specific criminal law. Both systems have national criminal codes primarily interpreted by

subnational courts. Such a study would use the rate at which the apex federal court of justice responsible for homologizing the decisions of the subnational courts actually reverses those courts.

Bibliography

Abraham, Yvonne. 2002. "Gay Marriage Ban Thwarted- MA Legislators Kill Ballot (Procedural Maneuver Denies Voters)." *Boston Globe*.

Abreu, Joâo Capistrano de. 1963. *Capítulos De Historia Colonial (1500-1800), E Os Caminhos Antigos E O Povoamento Do Brasil*. Brasília: Editora da Universidade de Brasília.

Abreu, Joâo Capistrano de. 1997. *Chapters of Brazil's Colonial History*. Oxford, GBR: Oxford University Press.

Ackerman, Bruce A. 1998. *We the People: Transformations*. Cambridge: Harvard University Press.

Acuña Ortega, Víctor Hugo. 1980. "La Reglamentación Del Comercio Exterior en América Central Durante El Siglo XVIII." *Mesoamérica* 1(1): 7–55.

Aguirre Beltrán, Gonzalo. 1972. *La Población Negra De México*. Second. Mexico City: Fondo de Cultura Economica.

Alden, Dauril. 1984. "Late Colonial Brazil, 1750-1808." In *The Cambridge History of Latin America, Volume 2*, ed. Leslie Bethell. Cambridge, UK: Cambridge University Press, 601–60.

Alesina, Alberto et al. 2003. "Fractionalization." *Journal of Economic Growth* 8(2): 155–94.

Alesina, Alberto, Reza Baqir, and Caroline Hoxby. 2004. "Political Jurisdictions in Heterogeneous Communities." *Journal of Political Economy* 112(2): 348–96.

Alvarado, Pablo. 1936. "Carta Enviada Por El Diputado Costarricense Pablo Alvarado (Guatemala, 3 Noviembre De 1823) Al Gobierno De Aquella Provincia." *Revista de los Archivos Nacionales* 1(1-2): 42–51.

Andrade, Celeste A de Sousa. 1947. "Regional Revolts in Brazil (From 1822-1934)."

Andrade, Manuel Correia de. 1997. *As Raízes Do Separatismo No Brasil*. Pernambuco: Editora Universitária da UFPE.

Ankit, Rakesh. 2016. "The Accession of Junagadh, 1947–48 ." *The Indian Economic & Social History Review* 53(3): 371–404.

Anna, Timothy. 1984. "The Independence of Mexico and Central America." In *The Cambridge History of Latin America, Volume 3*, ed. Leslie Bethell. Cambridge: Cambridge University Press, 51–94.

Aristotle. 1996. *Aristotle: the Politics and the Constitution of Athens*. ed. Stephen Everson. New York: Cambridge University Press.

Arretche, Marta. 2001. "Federalismo E Democracia No Brasil: a Visão Da Ciência Política Norte-Americana." *São Paulo em Perspectiva* 15: 23–31.

Asamblea Nacional Constituyente de Las Provincias Unidas de Centroamérica. B.6 Archivo General de Centroamérica *Asamblea Nacional Constituyente, 26 De Mayo, 1824*. Guatemala City.

Augustinus, Aurelius, and R W Dyson. 2007. *The City of God Against the Pagans*. Cambridge: Cambridge Univ. Press.

Avendaño Rojas, Xiomara. 2009. *Centroamérica Entre Lo Antiguo Y Lo Moderno*. Castelló de la Plana: Publicacions de la Universitat Jaime I.

Ayala Benítez, Luis Ernesto. 2007a. "La Iglesia Y La Independencia Política De Centro América : El Caso De El Estado De El Salvador, 1808-1833."

Bailey, Michael A, and Forrest Maltzman. 2011. *The Constrained Court*. Princeton, NJ: Princeton University Press.

Bangash, Yaqoob Khan. 2006. "Betrayal of Trust: Princely States of India and the Transfer of Power." *South Asia Research* 26(2): 181–99.

Barbour, Stephen. 2000. "Germany, Austria, Switzerland, Luxembourg." In *Language and Nationalism in Europe*, The Total Coincidence of Nations and Speech and Communities? eds. Stephen Barbour and Cathie Carmichael. Oxford: Oxford University Press, 151–67.

Barman, Roderick J. 1988. *Brazil*. Palo Alto, CA: Stanford University Press.

Basadre, Jorge. 1965. "'Conciencia De Sí'." In *The Origins of the Latin American Revolutions*, eds. John Lynch and Robin A. Humphreys. New York, NY: Knopf, 293–300.

Basile, Marcello. 2009. "O Laboratório Da Nação." In *O Brasil Imperial*, A Era Regencial, eds. Keila Grinberg and Ricardo Salles. Rio de Janeiro: Civilização Brasileira.

Beavers, Staci L, and Craig F Emmert. 2000. "Explaining State High-Courts' Selective Use of State Constitutions." *Publius* 30(3): 1–15.

Bednar, Jenna. 2013. "Constitutional Change in Federations: the Role of Complementary Institutions." In *Federal Dynamics: Continuity, Change, and the Varieties of Federalism*, Oxford, UK: Oxford University Press, 277–96.

Belaubre, Christophe. 2007. "Alcayaga, José Antonio." *Boletín de la AFEHC* (28).

Belaúnde, Víctor Andrés. 1938. *Bolívar and the Political Thought of the Spanish American Revolution*. Baltimore: Johns Hopkins University Press.

Beramendi, Pablo. 2012. *The Political Geography of Inequality*. Cambridge, UK: Cambridge University Press.

Bergfeld, Christoph. 1987. "*Preußen Und Das Allgemeine Deutsche Handelsgesetzbuch*." *Ius Commune* XIV: 101–10.

Bethell, Leslie. 1984. "The Independence of Brazil." In *The Cambridge History of Latin America, Volume 3*, ed. Leslie Bethell. Cambridge, UK: Cambridge University Press, 157–96.

Bhattacharya, Mohit. 1992. "The Mind of the Founding Fathers." In *Federalism in India*, eds. Nirmal Mukarji and Balveer Arora. New Delhi: Vikas, 87–104.

Bismarck, Otto von. 1866. "Bismarck's 'Putbus Dictations' on Germany's

Future Constitution (October-November 1866)" ed. James Retallack. *German History in Documents and Images*. http://ghdi.ghi-dc.org (April 14, 2020).

Bismarck, Otto von. 1929. "Speech to the Reichstag on 23 May 1870." In *Die Gesammelten Werke, Vol. 11, Reden: 1869 Bis 1878*, ed. Wilhelm Schüssler. Berlin, 117–20.

Blyn, George. 1966. *Agricultural Trends in India, 1891-1947*. Philadelphia: University of Pennsylvania Press.

Bombwall, K R. 1967. *The Foundations of Indian Federalism*. London, UK: Asia Publishing House.

Borges, Jorge Luis, and Adolfo Bioy Casares. 1946. "Museo." *Los Anales de Buenos Aires* 1(3).

Bödeker, Hans Erich. 2005. "Die Bürgerliche Literatur-Und Medienegesellschaft." In *Handbuch De Deutschen Bildungsgeschichte*, eds. Notker Hammerstein and Ulrich Herrmann. Munich: Beck, 499–546.

Brandão, Ulysses de Carvalho Soares. 1924. *A Confederação Do Equador*. Recife, BR: Pernambuco, Officinas Graphicas da Repartição de Publicação Officiaes.

Brasil. 1890. Colleçâo das Leis do Brasil de 1811 - Cartas de Lei, Alvarás e Cartas Régias *Alvará De 10 De Setembro De 1811*. Rio de Janeiro, BR.

Braudel, Fernand. 1979. III *The Perspective of the World, Volume III*. New York: Harper & Row.

Breuilly, John. 1996. *The Formation of the First German Nation-State, 1800-1871*. London: Macmillan.

Brinks, Daniel M. 2007. *The Judicial Response to Police Killings in Latin America*. Cambridge, UK: Cambridge University Press.

Brinks, Daniel M, and Abby Blass. 2018. *The DNA of Constitutional Justice in Latin America: Politics, Governance, and Judicial Design*.

Cambridge: Cambridge University Press.

Brown, Craig. 1988. “The Illustrated History of Canada.” *Labour / Le Travail* 22: 377.

Brown, Craig, ed. 2012. *The Illustrated History of Canada*. 6 ed. Toronto: University of Toronto Press.

Burgess, Michael. 2006. *Comparative Federalism*. New York, NY: Routledge.

Burgess, Michael. 2012. *In Search of the Federal Spirit*. Oxford, UK: Oxford University Press.

Burgess, Michael, and George Alan Tarr. 2012. *Constitutional Dynamics in Federal Systems*. Montreal, Canada: McGill-Queen's Press - MQUP.

Burns, E. Bradford. 1968. *Nationalism in Brazil*. New York: Praeger.

Burns, E. Bradford. 1993. *A History of Brazil*. Third Edition. New York, NY: Columbia University Press.

Butler, Rohan D'Olier. 1942. *The Roots of National Socialism*. New York: E.P. Dutton & Co., Inc.

Calogeras, João Pandía. 1939. *A History of Brazil*. Chapel Hill, NC: The University of North Carolina Press.

Carr, William. 1963. *Schleswig-Holstein, 1815-1848*. Manchester: Manchester University Press.

Carrillo, Agustín Gómez. 1886. *Estudio Histórico De La América Central*. Madrid: Imprenta de Hernando.

Carroll, Genevieve. 1967. “The German Confederation of 1815 and the North German Confederation of 1867.” eds. Carl B Cone and Gerard E Silberstein. University of Kentucky.

Carroll, Lewis, and Harry Furniss. 1893. *Sylvie and Bruno Concluded*. London: Macmillan.

Carvalho, José Murilo de. 1981. *A Construção Da Ordem*. Brasília: UnB.

Carvalho, José Murilo de. 1999. "Federalismo E Centralização No Império Brasileiro." In *Pontos E Borbados*, História e Argumento, Belo Horizonte, BR: Editora UFMG.

Carvalho, José Murilo de. 2003. "Brasil. Naciones Imaginadas." In *Inventando La Nación*, eds. Antonio Annino and François-Xavier Guerra. Mexico City: Fondo de Cultura Económica, 501–30.

Casañas-Adam, Elisenda. 2009. "Judicial Federalism From a Comparative Perspective." Unpublished Doctoral Dissertation, European University Institute.

Castagñola, Andrea. 2012. "I Want It All, and I Want It Now." *Journal of Politics in Latin America* 4(2): 39–62.

Chanda, Asok Kumar. 1965. *Federalism in India*. Allen & Unwin.

Chávez, Rebecca Bill. 2004. *The Rule of Law in Nascent Democracies*. Stanford University Press.

Chen, D L, and V Levonyan. 2019. "Do Policies Affect Preferences?" *NBER Working Papers*.

Chiriyankandath, James. 1992. "'Democracy' Under the Raj: Elections and Separate Representation in British India." *The Journal of Commonwealth Comparative Politics* 30(1): 39–63.

Choi, Stephen J, Mitu Gulati, and Eric A Posner. 2008. "Judicial Evaluations and Information Forcing." *Duke LJ* 58: 1313–81.

Clark, Tom S. 2011. *The Limits of Judicial Independence*. New York: Cambridge University Press.

Constant, Benjamin. 1814. *Réflexions Sur Les Constitutions*. Paris: De L'Imprimerie de Hocquet.

Constant, Benjamin. 1988. "Principles of Politics Applicable to All Governments." In *Constant, Political Writings*, ed. Biancamaria Fontana.

Cambridge: Cambridge University Press.

Copland, Ian. 1997. *The Princes of India in the Endgame of Empire*. Cambridge, UK: Cambridge University Press.

Cosío Villegas, Daniel. 1962. "Nacionalismo E Desenvolvimento." *Revista Brasileira de Política Internacional* V.

Curtis, Lionel. 1976. *Papers Relating to the Application of the Principle of Dyarchy to the Government of India*. Oxford, UK: Clarendon Press.

Dalence, José M. 1851. *Bosquejo Estadístico De Bolivia*. Chuquisaca, Bolivia: Ymprenta de Sucre.

Davis, J C Bancroft. 1889. "Federal Courts Prior to the Adoption of the Constitution." In *Appendix to the Reports of the Decisions of the Supreme Court of the United States*, New York: Banks & Brothers, xix–lxii.

Dayal, Rameshwar. 1962. "Remedies, Administrative and Judicial, Relating to Administrative Functions of High Courts." *Journal of the Indian Law Institute* 4(4): 537–51.

De, Rohit. 2016. "Constitutional Antecedents." In *The Oxford Handbook of the Indian Constitution*, eds. Sujit Choudhry, Madhav Khosla, and Pratap Bhanu Mehta. Oxford, UK: Oxford University Press, 17–37.

Dias, Maria Odila da Silva. 1986. "A Interiorização Da Metrópole." In *1822 Dimensões*, ed. Carlos Guilherme Mota. São Paulo, BRA: Perspectiva.

Dicey, Albert Venn. 1915. *Introduction to the Study of the Law of the Constitution*. London, UK: Macmillan.

Dikshit, R D. 1971. "Military Interpretation of Federal Constitutions." *Journal of Politics* 33(1): 180–89.

Dolhnikoff, Miriam. 2005. *O Pacto Imperial*. São Paulo: Editora Globo.

Dorsen, Norman, Michel Rosenfeld, András Sajó, and Susanne Baer. 2010. *Comparative Constitutionalism*. Second. eds. Norman Dorsen, Michel

Rosenfeld, András Sajó, and Susanne Baer. St. Paul, MN: West Academic.

Dworkin, Ronald. 1978. *Taking Rights Seriously*. Cambridge, MA: Harvard University Press.

Dym, Jordana. 2006. *From Sovereign Villages to National States*. Albuquerque: University of New Mexico Press.

Dym, Jordana. 2013. "Declarando Independencia ." In *Las Declaraciones De Independencia*, La Evolución de la Independencia Centroamericana, 1821-1864, eds. Jordana Dym, Alfredo Ávila, and Erika Pani. Mexico City: El Colegio de México, 299–330.

Eblen, Jack Ericson. 1968. *The First and Second United States Empires*. Pittsburgh, PA: Pittsburgh University Press.

Eckstein, Harry. 1975. "Case Studies and Theory in Political Science." In *Handbook of Political Science, Volume 7*, eds. Nelson W Polsby and Fred I Greenstein. Reading, MA: Addison-Wesley, 94–137.

Elazar, Daniel J. 1987. *Exploring Federalism*. Tuscaloosa, AL: University of Alabama Press.

Epp, Charles R. 1998. *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective*. Chicago, IL: University of Chicago Press.

Epstein, Lee, and Jack Knight. 1998. *The Choices Justices Make*. Washington, DC: CQ Press.

Eskridge, William N, and John Ferejohn. 2010. *A Republic of Statutes*. New Haven: Yale University of Press.

Facio, Rodrigo. 1949. *Trayectoria Y Crisis De La Federacion Centroamericana*. San José: C.R.

Facio, Rodrigo. 1965. *La Federación De Centroamérica, Sus Antecedentes, Su Vida Y Su Disolución.* San José, C.R.: Escuela Superior de Administración Pública América Central.

Fallas, Marco Antonio. 1972. *La Factoría De Tobacos De Costa Rica*. San José: Ediciones Costa Rica.

Falleti, Tulia G., and Edward L. Gibson. 2004. "Unity by the Stick." In *Federalism and Democracy in Latin America*, Regional Conflict and the Origins of Argentine Federalism, ed. Edward L. Gibson. Baltimore, MD: Johns Hopkins University Press, 226–54.

Falleti, Tulia G., and Maxwell A. Cameron. 2005. "Federalism and the Subnational Separation of Powers." *Publius: The Journal of Federalism* 35(2): 245–72.

Faoro, Raymundo. 2012. *Os Donos Do Poder*. Fifth Edition. São Paulo: Editora Globo.

Fausten, Dietrich, and Russell Smyth. 2008. "Coordinate Citations Between Australian State Supreme Courts Over the 20th Century." *Monash University Law Review* 34(1): 53–74.

Fausto, Boris, and Sérgio Fausto. 2014. *A Concise History of Brazil*. Second Edition. Cambridge: Cambridge University Press.

Fearon, James D, and David D Laitin. 2003. "Ethnicity, Insurgency, and Civil War." *American Political Science Review* 97(1): 75–90.

Feeley, Malcolm M., and Edward Rubin. 2008. *Federalism: Political Identity and Tragic Compromise*. Ann Arbor: University of Michigan Press.

Fernandes, Renata Silva. 2014. "O Governo Das Províncias Do Império Do Brasil." Universidade Federal de Juiz de Fora.

Filippov, Mikhail, Peter C Ordeshook, and Olga Shvetsova. 2004a. *Designing Federalism: a Theory of Self-Sustainable Federal Institutions*. Cambridge, UK: Cambridge University Press.

Filippov, Mikhail, Peter C Ordeshook, and Olga Shvetsova. 2004b. *Designing Federalism*. Cambridge, UK: Cambridge University Press.

Fino, Susan P. 1987. *The Role of State Supreme Courts in the New Judicial*

Federalism. New York, NY: Greenwood Press.

Fisher, John Robert. 1970. *Government and Society in Colonial Peru*. London: The Athlone Press.

Frankfurter Nationalversammlung. 1877. *Allgemeine Deutsche Wechselordnung Vom 26. Nov. 1848.* ed. Ed Graf. Nördlingen: Beck.

Freire, Felisbello. 1894. II *Historia Constitucional Da República Dos Estados Unidos Do Brasil, Volume II*. Rio de Janeiro: Typographia Moreira Maximino, Chagas & Co.

Freitas, Ana Paula Ribeiro. 2008. "Relações Entre Minas Gerais E O Poder Central Na Política Imperial (1870-1889)." *Anais do XIX Encontro Regional de História Poder, Violência, e Exclusão* XIX.

Freyre, Gilberto. 1970. *Order and Progress*. New York, NY: Knopf.

Furber, Holden. 1951. "The Unification of India, 1947-1951." *Pacific Affairs* 24(4): 352–71.

Galindo, Don Juan. 1836. " On Central America." *Journal of the Royal Geographic Society of London* 6: 116–36.

Gangal, S C. 1962. "An Approach to Indian Federalism." *Political Science Quarterly* 77(2): 248–53.

García Peláez, Francisco de Paula. 1852. III *Memorias Para La Historia Del Antiguo Reyno De Guatemala*. Guatemala City: Establecimiento Tipográfico de L. Luna.

Gerring, John. 2007. "Is There a (Viable) Crucial-Case Method?." *Comparative Political Studies* 40(3): 231–53.

Ghosh, Durba. 2017. "The Reforms of 1919." In *Gentlemanly Terrorists*, Montagu-Chelmsford, the Rowlatt Act, Jails Commission, and the Royal Amnesty, Cambridge, UK: Cambridge University Press, 27–59.

Gibson, Edward L. 2012. *Boundary Control*. London, UK: Cambridge University Press.

Glick, Henry Robert. 1971. *Supreme Courts in State Politics*. New York, NY: Basic Books.

Gloning, Thomas, and Christopher Young. 2004. *A History of the German Language Through Texts*. New York: Routledge.

González Saravia, Miguel. 1824. *Bosquejo Político Estadístico De Nicaragua*. Guatemala City: Beteta.

Graber, Mark A. 1993. "The Nonmajoritarian Difficulty ." *Studies in American Political Development* 7(1): 35–73.

Graham, Richard. 1990. *Patronage and Politics in Nineteenth-Century Brazil*. Palo Alto, CA: Stanford University Press.

Great Britain, India Office. 1918. Parliamentary Papers *Report on Indian Constitutional Reforms, Montagu-Chelmsford Report*. London, UK: His Majesty's Stationary Office.

Great Britain, India Office. 1919. *Government of India Act, 1919 [9 & 10 Geo. 5. Ch. 101]*. London, UK: Eyre and Spottiswoode, for W.R. Cooling, the King's Printer of Acts of Parliament.

Greene, Jack P. 2010. *The Constituional Origins of the American Revolution*. Cambridge: Cambridge University Press.

Greve, Michael S. 2012. *The Upside-Down Constitution*. Harvard University Press.

Guizot. 1836. "Essais Sur L'histoire De France."

Guizot, François. 1823. *Essai Sur l'Histoire De France. Complément Aux Observations De Malby.* Paris: J.L.J. Brière.

Halberstam, Daniel, M W Reimann, and J A Sanchez Cordero. 2012. *Federalism and Legal Unification*. eds. M W Reimann, Daniel Halberstam, and J A Sanchez Cordero. Paris: International Academy of Comparative Law.

Halberstam, Daniel, M W Reimann, and J A Sanchez Cordero. 2014.

Federalism and Legal Unification. Dordrecht, Netherlands: Springer.

Haring, Clarence Henry. 1949. *The Spanish Empire in America*. Oxford, U.K.: Oxford University Press.

Haring, Clarence Henry. 1968. *Empire in Brazil*. Cambridge, MA: Harvard University Press.

Hawkins, Timothy P. 2004. *José De Bustamante and Central American Independence*. Tuscaloosa: University of Alabama Press.

Hayward, Emma. 2015. "Theorizing the Devolution of Judicial Power: the Role of Elite Coordination." *University of Texas at Austin Graduate Student Public Law Conference*.

Helmke, Gretchen, and Jeffrey K Staton. 2011. "The Puzzling Judicial Politics of Latin America." In *Courts in Latin America*, eds. Gretchen Helmke and Julio Rios Figueroa. Cambridge: Cambridge University Press, 306–31.

Henderson, W O. 1959a. "Introduction to the Second Edition." In *The Zollverein*, Chicago: Quadrangle Books.

Henderson, W O. 1959b. *The Zollverein*. Second. Chicago: Quadrangle Books.

Herrarte, Alberto. 1963. "La Unión De Centro América: Tragedia Y Esperanza." 26.

Hirschl, Ran. 2013. "The Strategic Foundations of Constitutions." In *Social and Political Foundations of Constitutions*, eds. Denis J Galligan and Mila Versteeg. Cambridge: Cambridge University Press, 157–81.

Hitler, Adolf. 1939. "Chapter 10: the Mask of Federalism." In *Mein Kampf (My Struggle)*.

Hobsbawm, Eric John. 1992. *Nations and Nationalism Since 1780*. 2nd ed. Cambridge: Cambridge University Press.

Holanda, Sérgio Buarque de. 1985. "A Herança Colonial -- Sua

Desagregação." In *História Geral Da Civilização Brasileira, Tomo II, Volume I*, ed. Sérgio Buarque de Holanda. São Paulo, BRA: Difel, 9–39.

Holmes, Oliver Wendell, Jr. 1913. "Address to the Harvard Law School Association of New York, New York City, February 15, 1913." In *Speeches by Oliver Wendell Holmes, Jr*,, 102.

Hooghe, Liesbet et al. 2015. *A Postfunctionalist Theory of Governance Vol. 1*. Oxford, UK: Oxford University Press.

Hooghe, Liesbet, Gary Marks, and Arjan H Schakel. 2010. *The Rise of Regional Authority*. London, UK: Taylor & Francis.

Howitt, William. 1842. *The Rural and Domestic Life of Germany*. London: Longman, Brown, Green and Longmans, Paternoster-Row.

Huber, Ulrich. 1978. "Das Reichsgesetz Über Die Einführung Einer Allgemeinen Wechselordnung Für Deutschland Vom 26. November 1848." *JuristenZeitung* 33(23/24): 785–91.

Hueglin, Thomas O, and Alan Fenna. 2006. *Comparative Federalism*. Toronto, Canada: University of Toronto Press.

Humphreys, Robin A. 1946. *The Evolution of Modern Latin America*. London: Oxford University Press.

Huntington, Samuel P. 1991. *The Third Wave: Democratization in the Late Twentieth*. Norman, OK: University of Oklahoma Press.

India. 1949a. *Constituent Assembly Debates, Official Reports, Volume IX (July 30, 1949-September 18, 1949)*. New Delhi, India: Lok Sabha Secretariat.

India. 1949b. *Constituent Assembly Debates, Official Reports, Volume VII (November 4, 1948-January 8, 1949)*. New Delhi, India: Lok Sabha Secretariat.

India. 1950. *White Paper on Indian States*. Delhi, India: Manager of Publications.

Ingram, Matthew C. 2009. “Crafting Courts in New Democracies.” University of New Mexico Department of Political Science.

Jackson, Robert, Supreme Court of the United States. 1945. *Herb v. Pitcairn*. 244 U.S.

Jancsó, István, and João Paulo Pimenta. 2000. “Peças De Um Mosaico.” In *Viagem Incompleta - a Experiência Brasileira (1500-2000), Volume 1*, (ou apontamentos para o estudo da emergência da identidade nacional brasileira), ed. Carlos Guilherme Mota. Sâo Paulo, BR: Editora Senac.

Jansen, Christian. 2011a. *Gründerzeit Und Nationsbildung 1849-1871*. Paderborn: Schöningh.

Jansen, Christian. 2011b. “The Formation of German Nationalism, 1740-1850.” In *The Oxford Handbook of Modern German History*, ed. Helmut Walser Smith. Oxford: Oxford University Press, 234–59.

Johnson, Lyman L., and Susan Migden Socolow. 1979. “Population and Space in Eighteenth-Century Buenos Aires.” In *Social Fabric and and Spatial Structure in Colonial Latin America*, ed. David James Robinson. Syracuse, NY: Syracuse University.

Johnson, Willard R. 1970. *The Cameroon Federation*. Princeton, NJ: Princeton University Press.

Jones, William Jervis. 1999. *Images of Language*. Amsterdam: John Benjamins B.V.

Juarros, Domingo. 1808. *Compendio De La Historia De La Ciudad De Guatemala, Volume I*. Guatemala: Diego Ignacio Beteta.

Juarros, Domingo. 1810. *Compendio De La Historia De La Ciudad De Guatemala, Volume II*. Guatemala: Diego Ignacio Beteta.

Karnes, Thomas L. 1961. *The Failure of Union*. Chapel Hill, NC: The University of North Carolina Press.

Karr, Jean-Baptiste Alphonse. 1849. “Les Guêpes.” *Les Guêpes* 6.

Katz, Ellis, and George Alan Tarr. 1996. *Federalism and Rights*. Lanham, MD: Rowman & Littlefield.

Keohane, Robert Owen, Gary King, and Sidney Verba. 1994. *Designing Social Inquiry*. Princeton: Princeton University Press.

Keudell, Felix Max Leopold Robert von. 1901. *Fürst Und Fürstin Bismarck. Erinnerungen Aus Den Jahren 1846 Bis 1872*. Berlin: W. Spemann.

Kidwai, Ayesha. 2008. "Managing Multilingual India." *The Marxist* 24(2): 1–7.

Kim, Heewon, and Gurharpal Singh. 2016. "The Challenges of Managing Religious Diversity in India." In *The Politics and Practice of Religious Diversity*, Between Hegemonic Domination and the Quest for Equality, ed. Andrew Dawson. New York, NY: Routledge, 49–64.

Kincaid, John. 2011. *Federalism*. ed. John Kincaid. Thousand Oaks, CA: Sage Publications.

Kincaid, John, and George Alan Tarr. 2005. *Constitutional Origins, Structure, and Change in Federal Countries*. eds. John Kincaid and George Alan Tarr. Montreal, Canada: McGill-Queen's Press - MQUP.

Knapp, Victor. 1984. "Socialist Federation ." *Michigan Law Review* 82(5/6): 1213–28.

Koch, Hannsjoachim Wolfgang. 1984. *A Constitutional History of Germany*. London: Longman.

Kommers, Donald P, and Russell A Miller. 2012. *The Constitutional Jurisprudence of the Federal Republic of Germany*. Durham, NC: Duke University Press.

Kuchenbauer, Konstantin. 2015. *Strafrechtliche Kontrolle Des Außenwirtschaftsverkehrs Im Spannungsfeld Zwischen Politik Und Verfassung Eine Untersuchung Der Verfassungsmäßigkeit Des § 34 Abs. 2 AWG Unter Besonderer Berücksichtigung Der Historischen Und Verfassungsrechtlichen Grundlagen Des Staatsschutz-Strafrechts*.

Berlin: Logos Verlag Berlin GmbH.

La Junta Central Suprema y Gubernativa de España e Indias. 1809. XVI Gazeta de México *Real Orden De La Junta Central Expedida El 22 De Enero De 1809*.

Laguardia, Jorge Mario García. 1991. "Centroamérica en Las Cortes De Cádiz." *Anuario Mexicano de Historia del Derecho* (3): 59–80.

Langer, Laura. 2002. *Judicial Review in State Supreme Courts*. New York, NY: SUNY Press.

Lanuza Matamoros, Alberto. 1976. "Estructuras Socioeconómicos, Poder, Y Estado en Nicaragua, De 1821 a 1875." [CSUCA] Programa Centroamericana de Ciencias Sociales.

Le Roy, Katy, and Cheryl Saunders. 2006. *Legislative, Executive, and Judicial Governance in Federal Countries*. eds. Katy Le Roy and Cheryl Saunders. Montreal, Canada: McGill-Queen's Press - MQUP.

Ledford, Kenneth F. 1993. "Lawyers, Liberalism, and Procedure: the German Imperial Justice Laws of 1877-79." *Central European History* 26(2): 165–93.

Leff, Nathaniel H. 1982. 1 *Underdevelopment and Development in Brazil*. Boston, MA: Allen and Unwin.

Legg, Stephen. 2016. "Dyarchy." *Comparative Studies of South Asia, Africa, and the Middle East* 36(1): 44–65.

Leiras, Marcelo, Guadalupe Tuñón, and Agustina Giraudy. 2015. "Who Wants an Independent Court?." *Journal of Politics* 77(1): 175–87.

Leite, Glacyra Lazzari. 1989. *Pernambuco 1824*. Recife, BR: FUNDAJ, Editora Massangana.

Lenaerts, Koen. 1990. "Constitutionalism and the Many Faces of Federalism." *The American Journal of Comparative Law* 38(2): 205.

Lesser, Jeffrey. 2013. *Immigration, Ethnicity, and National Identity in*

Brazil, 1808 to the Present. Cambridge, UK: Cambridge University Press.

Levinson, Sanford V. 2012. *Framed*. Oxford, UK: Oxford University Press.

Lindo Fuentes, Héctor. 1993. "Economia Y Sociedad (1810-1870)." In *Historia General De Centroamérica, Tomo III*, ed. Héctor Pérez Brignoli. Madrid: Sociedad Estatal Quinto Centeria-FLACSO, 141–201.

Lockhart, James, and Stuart B. Schwartz. 1983. *Early Latin America*. Cambridge, GBR: Cambridge University Press.

Lombardi, John V. 1976. *People and Places of Colonial Venezuela*. Bloomington, IN: Indiana University Press.

Lovell, George I. 2003. *Legislative Deferrals*. Cambridge University Press.

Lovell, William George. 1985. *Conquest and Survival in Colonial Guatemala*. Kingston: McGill-Queen's University Press.

Luján Muñoz, Jorge. 1982. "La Asamblea Nacional Constituyente Centroamericana De 1823-1824." *Revista de Historia de America* 0(94): 33.

Lukemeyer, Anna. 2003. *Courts as Policymakers*. El Paso, TX: LFB Scholarly Publishing LLC.

Lüke, Martina. 2009. "Anti-Napoleonic Wars of Liberation (1813-1815)." In *The International Encyclopedia of Revolution and Protest*, ed. Immanuel Ness. Malden: Wiley-Blackwell, 188–90.

Machiavelli, Niccolò, and Harvey C Mansfield. 19AD. *The Prince : Niccolo Machiavelli.* Chicago: University of Chicago Press.

MacLachlan, Colin. 2003. *A History of Modern Brazil*. Wilmington, DE: Scholarly Resources.

Mahoney, James, and Dietrich Rueschemeyer. 2003. *Comparative Historical Analysis in the Social Sciences*. Cambridge University Press.

Mahoney, James, and Kathleen Ann Thelen. 2015. *Advances in Comparative -Historical Analysis*. Cambridge: Cambridge University Press.

Majeed, Akhtar, Ronald L. Watts, and Douglas Brown. 2006. *Distribution of Powers and Responsibilities in Federal Countries*. eds. Akhtar Majeed, Ronald L. Watts, and Douglas Brown. Montreal, Canada: McGill-Queen's Press - MQUP.

Malaviya, Madan Mohan. 1918. *A Criticism of Montagu-Chelmsford Proposals of Indian Constitutional Reform*. Allahabad, IN: C.Y. Chintamani.

Martin, Ged. 1995. *Britain and the Origins of Canadian Federation, 1837-1867*. Cambridge, UK: Cambridge University Press.

Martínez-Alier, Verena. 1974. *Marriage, Class, and Colour in Nineteenth-Century Cuba*. Cambridge, GBR: Cambridge University Press.

Marure, Alejandro. 1837. *Bosquejo Histórico De Las Revoluciones De Centro-América: Desde 1811 Hasta 1834, Volume I*. Guatemala: Imp. de la N. Academia de Estudios.

Mattos, Ilmar Rohloff de. 1987. *O Tempo Saquarema*. São Paulo: Hucitec.

Mauro, Frédérick. 1984. "Portugal and Brazil." In *Cambridge History of Latin America, Volume 1*, Political and Economic Structures of Empire, 1580-1750, ed. Leslie Bethell. Cambridge, 441–68.

Mayer, Brantz. 1907. *Mexico, Central America, and the West Indies*. ed. Frederick Albion Ober. Chicago: John D. Morris & Company.

McAllister, Lesley K. 2005. "Public Prosecutors and Environmental Protection in Brazil." In *Environmental Issues in Latin America and the Caribbean*, Environmental Issues in Latin America and the Caribbean, eds. Aldemaro Romero and Sarah E West. Dordrecht: Springer Netherlands, 207–29.

McAllister, Lesley K. 2008. *Making Law Matter : Environmental Protection and Legal Institutions in Brazil*. Stanford, Calif.: Stanford University

Press.

McMahon, Kevin J. 2003. *Reconsidering Roosevelt on Race*. Chicago, IL: University of Chicago Press.

Meléndez Chaverri, Carlos. 1974. *La Ilustración en El Antiguo Reino De Guatemala*. Second. San José: EDUCA.

Mello, Evaldo Cabral de. 2004. *A Outra Independência*. Sâo Paulo, BR: Editora 34.

Meneray, Wilbur E. 1975. "The Kingdom of Guatemala During the Reign of Charles III, 1759-1788."

Michelmann, Hans. 2009. *Foreign Relations in Federal Countries*. Montreal, Canada: McGill-Queen's Press - MQUP.

Mill, John Stuart. 1974. "Of the Four Methods of Experimental Inquiry." In *The Collected Works of John Stuart Mill, Volume VII*, ed. John M Robson. Toronto: University of Toronto Press, 388–406.

Ministro de Relaciones Exteriores por el Jefe de la Comisión Guatemalteca. 1964. *Memoria Sobre La Cuestion De Límites Entre Guatemala Y México*. Guatemala, C.A.: De Piñeda Ibarra.

Mommsen, Wolfgang J. 1995. *Imperial Germany 1867-1918*. London: Arnold.

Montiel Argüello, Alejandro. 2005. *Nicaragua Y Costa Rica en La Constituyente De 1823*. Managua: Fundación Uno.

Montúfar y Coronado, Manuel. 1963. II *Memorias Para La Historia De La Revolución De Centroamérica, Volume II*. Guatemala City, Guatemala: Ministerio de Educación Pública.

Moore, Barrington, Jr. 1966. *Social Origins of Dictatorship and Democracy*. Boston: Beacon Press.

Morales Baños, Antonio. 1985. *Morazán Y Carrera, O, Liberales Y Conservadores, 1821-1842*. Guatemala: Ministerio de la Defensa

Nacional de Guatemala.

Moreno, Luis, and César Colino. 2010. *Diversity and Unity in Federal Countries*. eds. Luis Moreno and César Colino. Montreal, Canada: McGill-Queen's Press - MQUP.

Morey, William C. 2016. "The Sources of American Federalism." *The Annals of the American Academy of Political and Social Science* 6(2): 1–30.

Morey, William Carey. 1895. "The Sources of American Federalism." *The Annals of the American Academy of Political and Social Science* 6: 1–30.

Muni, Sukh Deo. 1996. "Ethnic Conflict, Federalism, and Democracy in India." In *Ethnicity and Power in the Contemporary World*, eds. Kumar Rupesinghe and Valery A. Tishkov. Tokyo, Japan: United Nations University Press, 179–98.

Mussa, Alberto Baeta Neves. 1991. "O Papel Das Linguas Africanas Na História Do Portugués Do Brasil." Faculdade de Letras, Universidade Federal do Rio de Janeiro.

Nassall, Wendt. 2008. "Verfassungsgerichtliche Lawinensprengung?." *Neue Juristische Wochenschrift* 47: 3390–92.

Nicolson, Arthur , Baron Carnock. 1875. *A Sketch of the German Constitution and of the Events in Germany From 1815 to 1871*. London: Longmans, Green and Company.

Nipperdey, Thomas. 1996. *Germany From Napoleon to Bismarck*. Princeton: Princeton University Press.

Oliveira Lima, Manoel de. 1914. *The Evolution of Brazil*. Palo Alto: Stanford University Press.

Olson, Mancur. 1993. "Dictatorship, Democracy, and Development." *American Political Science Review* 87(3): 567–76.

Ostrom, Vincent. 2008. *The Political Theory of a Compound Republic*. Lanham, MD: Lexington Books.

Palermo, Franceso, and Karl Kössler. 2017. *Comparative Federalism*. Oxford, UK: Hart.

Pannwitz, von, Kurt. 1999. *Die Entstehung Der Allgemeinen Deutschen Wechselordnung: Ein Beitrag Zur Geschichte Der Vereinheitlichung Des Deutschen Zivilrechts Im 19. Jahrhundert. Rechtshistorische Reihe, Vol. 193*. Frankfurt am Main: Peter Lang.

Parent, Joseph M. 2011. *Uniting States*. Oxford, UK: Oxford University Press.

Paris, Michael. 2010. *Framing Equal Opportunity*. Palo Alto, CA: Stanford University Press.

Patch, Robert W. 2002. *Maya Revolt and Rebellion in the Eighteenth Century*. Armonk, NY: M.E. Sharpe.

Perez, Hector. 1997. "Estimates of the Indigenous Population of Central America." In *Demographic Diversity and Change in the Central American Isthmus*, (16th to 20th Centuries), eds. Anne R Pebley and Luis Rosero-Bixby. Santa Monica: RAND, 97–115.

Perkins, Frances, United States, Social Security Administration. 1972. *The Roots of Social Security*. Baltimore: Social Security Administration, Office of Administration.

Pernice, Ingolf. 1996. *Harmonization of Legislation in Federal Systems*. ed. Ingolf Pernice. New York: Juris Publishing, Inc.

Pesavento, Sandra Jatahy. 2009. "Uma Certa Revolução Farroupilha." In *O Brasil Imperial*, eds. Keila Grinberg and Ricardo Salles. Rio de Janeiro: Civilização Brasileira, 233–68.

Pflanze, Otto. 1990. "Transition in Domestic Policy, 1875–1876." In *Bismarck and the Development of Germany, Volume II*, Princeton University Press, 322–54.

Phillips, Frank. 2004. "Majority in Mass. Poll Oppose Gay Marriage." *Boston Globe*.

Pollack, Aaron. 2019. “Independence in Central America and Chiapas, 1770–1823.”

Pollock, Stewart G. 1982. “State Constitutions as Separate Sources of Fundamental Rights.” *Rutgers Law Review* 35(4): 707.

Prado Júnior, Caio. 1967. *The Colonial Background of Modern Brazil*. Berkeley, CA: University of California Press.

Priore, Mary del, and Renato Venancio. 2010. *Uma Breve História Do Brasil*. São Paulo, BR: Planeta.

Przeworski, Adam J, and Henry Teune. 1970. “Research Designs.” In *The Logic of Comparative Social Inquiry*, "Most Similar Systems" Design. “Most Different Systems” Designs. Univariate Comparisons. Comparing Relationships, New York: Wiley-Interscience, 31–46.

Putnam, Robert D. 1988. “Diplomacy and Domestic Politics.” *International Organization* 42(3): 427–60.

Raghavan, Srinath. 2010a. “Hyderabad 1947-1948.” In *War and Peace in Modern India*, London: Palgrave Macmillan UK, 65–100.

Raghavan, Srinath. 2010b. “Junagadh 1947.” In *War and Peace in Modern India*, ed. Srinath Raghavan. London, UK: Palgrave Macmillan UK, 26–64.

Ragin, Charles C. 1987. *The Comparative Method*. First Edition. Berkeley: University of California Press.

Ragin, Charles C. 2014. *The Comparative Method*. Second Edition. Berleley: University of California Press.

Ramseyer, J Mark, and Eric B Rasmusen. 2003. *Measuring Judicial Independence*. Chicago, IL: University of Chicago Press.

Ray, Bharati. 1967. *Evolution of Federalism in India*. Calcutta, India: Progressive Publishers.

Rebell, Michael A. 2009. *Courts and Kids*. Chicago, IL: University of

Chicago Press.

Rector, Chad. 2009. *Federations*. Ithaca, NY.

Ricart-Huguet, Joan, and Elliott Green. 2018. "Taking It Personally: the Effect of Ethnic Attachment on Preferences for Regionalism." *Studies in Comparative International Development* 53(1): 67–89.

Ricci, Magda. 2009. "Cabanos, Patriotismo, E Identidades." In *O Brasil Imperial*, Outras Histórias de uma Revolução, eds. Keila Grinberg and Ricardo Salles. Rio de Janeiro: Civilização Brasileira, 185–232.

Riker, William H. 1964a. *Federalism: Origin, Operation, and Significance*. Boston: Little, Brown.

Riker, William H. 1964b. *Federalism: Origin, Operation, Significance*. 1st ed. Boston: Little, Brown, and Company. http://www.getcited.org/pub/101208700.

Riker, William H. 1975. "Chapter 2: Federalism." In *Handbook of Political Science, Volume 5, Governmental Institutions and Processes*, eds. Nelson W Polsby and Fred I Greenstein. Reading, Mass.: Addison-Wesley, 93–172.

Rodden, Jonathan. 2004. "Comparative Federalism and Decentralization: on Meaning and Measurement." *Comparative Politics* 36(4): 481.

Rokkan, Stein, and Seymour Michael Lipset. 1967. *Party Systems and Voter Alignments*. New York, NY: Free Press.

Roosevelt, Franklin Delano. 1938. "Radio Address of Franklin D. Roosevelt on States' Rights ." In *The Public Papers and Addresses of Franklin D. Roosevelt, Volume I*, As Governor of New York, March 2, 1930, ed. Samuel I Rosenman. New York: Random House, 569–75.

Rubin, Neville. 1971. *Cameroun*. New York: Praeger Publishers, Inc.

Russell-Wood, A. J. R. 1975. "Preconditions and Precipitants of the Independence Movement in Portuguese America." In *From Colony to Nation*, ed. A. J. R. Russell-Wood. Baltimore, MD, 3–40.

Sambanis, Nicholas, and Branko Milanovic. 2011. *Explaining the Demand for Sovereignty*. Washington, DC: The World Bank.

Sanders, Ruth H. 2010. *German*. Oxford: Oxford University Press.

Sánchez-Albornoz, Nicolás. 1984. "The Population of Colonial Spanish America." In *The Cambridge History of Latin America*, ed. Leslie Bethell. Cambridge: Cambridge University Press, 1–36.

Schmidt, Georg. 1999. *Geschichte Des Alten Reiches*. Munich: Beck.

Schneider, Ronald M. 1991. *"Order and Progress."* Boulder, CO: Westview Press.

Schneider, Ronald M. 1996. *Brazil*. Boulder, CO: Westview Press.

Schroeder, Paul. 1994. *The Transformation of European Politics, 1763-1848*. Oxford: Oxford University Press.

Schultz, David. 2005. "Redistricting and the New Judicial Federalism." *Rutgers Law Journal* 37(4): 1087.

Schurz, William Lytle. 1961. *Brazil*. New York, NY: E.P. Dutton.

Schwartzberg, Joseph E, and Robert Stoddard. 1995. "Evolving Ethnicity in South Asia with Particular Reference to India." In *The Challenge of Ethnic Conflict to National and International Order in the 1990s*, Washington, DC: Central Intelligence Agency, 130–49.

Shapiro, Martin. 1986. *Courts. a Comparative and Political Analysis.* Chicago.

Shapiro, Martin. 1989. "Political Jurisprudence, Public Law, and Post-Consequentialist Ethics." *Studies in American Political Development* 3: 88–102.

Shomade, Salmon A. 2018. *Decision Making and Controversies in State Supreme Courts*. Lanham, MD: Rowman & Littlefield.

Simoncini, Marta. 2018. *Administrative Regulation Beyond the Non-*

Delegation Doctrine: A Study on EU Agencies. London, UK: Bloomsbury Publishing PLC.

Delegation Doctrine : a Study on EU Agencies..”

Sinha, Sachchidananda. 1935. “Dyarchy or Provincial Autonomy in India.” In *A Selection From the Speeches and Writings of Sachchidananda Sinha*, Allahabad, IN: R.N. Lal, 1–20.

Skocpol, Theda. 1979. *States and Social Revolutions*. Cambridge: Cambridge University Press.

Skocpol, Theda. 1984. “Emerging Agendas and Recurrent Strategies in Historical Sociology.” In *Vision and Method in Historical Sociology*, ed. Theda Skocpol. Cambridge: Cambridge University Press, 356–91.

Smith, Helmut Walser. 2011a. “Introduction.” In *The Oxford Handbook of Modern German History*, ed. Helmut Walser Smith. Oxford: Oxford University Press, 1–28.

Smith, Helmut Walser, ed. 2011b. *The Oxford Handbook of Modern German History*. Oxford: Oxford University Press.

Smyth, Russell, and Vinod Mishra. 2011. “The Transmission of Legal Precedent Across the Australian State Supreme Courts Over the Twentieth Century.” *Law & Society Review* 45(1): 139–70.

Spaeth, Harold J, and Jeffrey A Segal. 1993. *The Supreme Court and the Attitudinal Model*. Cambridge, UK: Cambridge University Press.

Spaeth, Harold J, and Jeffrey A Segal. 2002. *The Supreme Court and the Attitudinal Model Revisited*. Cambridge, UK: Cambridge University Press.

Spate, O H K, and A T A Learmonth. 2017. *India and Pakistan*. 4 ed. New York, NY: Routledge.

Squier, E G. 1856. *Notes on Central America*. London: Sampson Low, Son, & Co.

Stepan, Alfred C. 1999. “Federalism and Democracy: Beyond the U.S. Model.” *Journal of Democracy* 10(4): 19–34.

Stepan, Alfred C. 2001. “Toward a New Comparative Politics of Federalism, (Multi)Nationalism, and Democracy.” In *Arguing Comparative Politics*, Beyond Rikerian Federalism, New York, NY: Oxford University Press, 315–61.

Stepan, Alfred C. 2004a. “Constitutional Dynamics in Federal Systems.” In *Federalism and Democracy in Latin America*, Beyond Rikerian Federalism, ed. Edward L. Gibson. Baltimore, MD: Johns Hopkins University Press, 29–84.

Stepan, Alfred C. 2004b. “Toward a New Comparative Politics of Federalism, Multinationalism,and Democracy.” In *Federalism and Democracy in Latin America*, Beyond Rikerian Federalism, ed. Edward L. Gibson. Baltimore, MD: Johns Hopkins University Press, 29–84.

Steytler, Nico. 2009. *Local Government and Metropolitan Regions in Federal Countries*. ed. Nico Steytler. Montreal, Canada: McGill-Queen's Press - MQUP.

Stickel, Gerhard. 2010. “The Evolution of a European Language.” *Kalbos Kultura* 83.

Stone, Samuel. 1983. “Production and Politics in Central America's Convulsions.” *Journal of Latin American Studies* 15(2): 453–69.

Stone, Samuel Z. 1982. *La Dinastía De Los Conquistadores : La Crisis Del Poder en La Costa Rica Contemporánea*. 3rd ed. San José, Costa Rica: Editorial Universitaria Contemporánea.

Strong, H. A., and Kuno Meyer. 1886. *Outlines of a History of the German Language*. London: Swan Sonnenschein, Le Bas & Lowrey, Paternoster Square.

Supreme Court of Pennsylvania. 2013. 38 A.3d *Holt v. 2011 Legislative Reapportionment Commision*.

Supreme Court of Pennsylvania. 2018. 178 A. 3d *League of Women Voters v. Commonwealth*. eds. Thomas G Saylor Chief Justice et al. Pa: Supreme Court.

Sutton, Jeffrey S. 2018. *51 Imperfect Solutions*. Oxford, UK: Oxford University Press.

Sweet, Alec Stone. 1999. "Judicialization and the Construction of Governance." *Comparative Political Studies* 32(2): 147–84.

Swenden, Wilfried, John Loughlin, and John Kincaid. 2013. *Routledge Handbook of Regionalism & Federalism*. New York, NY: Routledge.

Swenson, Karen. 1999. "School Finance Reform Litigation ." *Albany Law Review* 63(1): 1147.

Tarr, Alan G. 2012. *Without Fear or Favor*. Palo Alto, CA: Stanford University Press.

Tarr, George Alan. 1977. *Judicial Impact and State Supreme Courts*. Lanham, MD: Lexington Books.

Tarr, George Alan, and Mary Cornelia Porter. 1988. *State Supreme Courts in State and Nation*. New Haven, CT: Yale University Press.

Tarr, George Alan, and Mary Cornelia Porter, eds. 1982. *State Supreme Courts*. Westport, CT: Greenwood Press.

Taylor, Alan John Percivale. 1945. *The Course of German History*. London: Hamish Hamilton.

Thompson, G A. 1829. *Narrative of an Official Visit to Guatemala From Mexico*. London, GBR: G. Woodfall.

Times of India. 2015. "India Amongst Last Surviving Zones of Linguistic Diversity: JNU Professor." *The Times of India*.

Torres, Edelberto. 1985. "Francisco Morazán and the Struggle for a Central American Union." In *Honduras*, eds. Nancy Peckenham and Annie Street. New York, NY: Praeger, 9–18.

Torres, João Camillo de Oliveira. 1961. *A Formação Do Federalismo No Brasil*. São Paulo: Companhia Editora Nacional.

Townsend Ezcurra, Andrés. 1973. *Las Provincias Unidas De Centroamérica: Fundación De La República*. Editorial Costa Rica.

Tushnet, Mark V. 1990. *Comparative Constitutional Federalism*. ed. Mark V. Tushnet. New York, NY: Greenwood Press.

UK. 1871. "Constitution of the North German Confederation. Adopted by the Diet April 16, and Promulgated June 14, 1867." ed. H.M. Stationary Office. *British and Foreign State Papers* 57: 296–313.

United States. 1949. *The Revolutionary War Prize Cases*. Washington, D.C.: National Archives and Records Service, General Services Administration.

Ura, Joseph Daniel. 2014. "Backlash and Legitimation: Macro Political Responses to Supreme Court Decisions." *American Journal of Political Science* 58(1): 110–26.

Vallbé, Joan Josep. 2014. "Measuring the Judicial Power of Regions: a Judicial Regional Authority Index." In Salamanca, Spain.

Valle, Rafael Heliodoro. 1924. I *La Anexión De Centro América a México*. México: México, Secretaría de Relaciones Exteriores.

Van Oss, Adriann C. 1985. "Central America's Autarkic Colonial Cities (1600-1800)." In *Colonial Cities*, eds. Robert J. Ross and Gerard J Telkamp. Dordrecht, Netherlands: Martinus Nijhoff, 33–50.

Versteeg, Mila, and Denis J Galligan, eds. 2013. *Social and Political Foundations of Constitutions*. Cambridge: Cambridge University Press.

Wagner, Wenceslas J. 1959. *The Federal States and Their Judiciary*. 's-Gravenhage, Netherlands: Mouton & Co.

Waite, Peter Busbey. 1962. *The Life and Times of Confederation: 1864-1867*. 1st ed. Toronto, Canada: University of Toronto Press.

Waite, Peter Busbey. 2012. “Between Three Oceans.” In *The Illustrated History of Canada*, Challenges of a Continental Destiny (1840-1900), ed. Craig Brown. Toronto: University of Toronto Press, 277–376.

Ward, Lee, and Ann Ward. 2009. *The Ashgate Research Companion to Federalism*. eds. Lee Ward and Ann Ward. Burlington, VT: Ashgate Publishing, Ltd.

Watts, Ronald L. 1998. “Federalism, Federal Political Systems, and Federations.” *Annual Review of Political Science* 1(1): 117–37.

Watts, Ronald Lampman. 2008. *Comparing Federal Systems*. 3rd ed. London, U.K.: Institute of Intergovernmental Relations.

Weinstock, Daniel M. 2001. “Towards a Normative Theory of Federalism.” *International Social Science Journal* 53(1): 75–83.

Weller, Nicholas, and Jeb Barnes. 2014. *Finding Pathways*. Cambridge: Cambridge University Press.

Whately, Thomas, George Grenville, John Campbell, and John Dickinson. 1865. *The Regulations Lately Made Concerning the Colonies and the Taxes Imposed Upon Them, Considered*. London: J. Wilkie.

Wheare, Kenneth Clinton. 1963. *Federal Government*. 4 ed. New York: Oxford University Press.

Whittington, Keith E. 2005. “‘Interpose Your Friendly Hand’ .” *American Political Science Review* 99(4): 583–96.

Whittington, Keith E. 2009. 105 *Political Foundations of Judicial Supremacy*. Princeton University Press.

Wibbels, Erik. 2005. “Decentralized Governance, Constitution Formation, and Redistribution.” *Constitutional Political Economy* 16(2): 161–88.

Williams, Robert Forrest. 2009. *The Law of American State Constitutions*. Oxford, UK: Oxford University Press.

Wirth, John D. 1977. *Minas Gerais in the Brazilian Federation, 1889-1937*.

Palo Alto, CA: Stanford University Press.

Woodward, Ralph Lee, Jr. 1966. *Class Privilege and Economic Development*. Chapel Hill: University of North Carolina Press.

Woodward, Ralph Lee, Jr. 1985. "The Economy of Central America at the Close of the Colonial Period." In *Estudios Del Reino De Guatemala*, ed. Duncan Theobald Kinkead. Durham: Duke University Press, 117–34.

Woodward, Ralph Lee, Jr. 1992. *Rafael Carrera and the Emergence of the Republic of Guatemala, 1821-1871*. Athens, GA: University of Georgia Press.

Woodward, Ralph Lee, Jr. 1996. "The Liberal-Conservative Debate in the Central American Federation, 1823-1840." In *Liberals, Politics, and Power*, eds. Vincent C Peloso and Barbara A Tenenbaum. Athens, GA: University of Georgia Press, 59–89.

Woodward, Ralph Lee, Jr. 1999. *Central America*. Third Edition. Oxford, U.K.: Oxford University Press.

Wortman, Miles. 1975. "Government Revenue and Economic Trends in Central America, 1787-1819." *Hispanic American Historical Review* 55(2): 251–86.

Zackin, Emily. 2013. *Looking for Rights in All the Wrong Places*. Princeton, NJ: Princeton University Press.

Zamora, Michael. 2018. "Iowa Polls Show Shifting Attitudes on Same-Sex Marriage." *Des Moines Register*.

Ziblatt, Daniel. 2004. "Rethinking the Origins of Federalism: Puzzle, Theory, and Evidence From Nineteenth-Century Europe." *World Politics* 57(01): 70–98.